

VOLUME 7

1974

NUMBER 5

## INDIANA LAW REVIEW

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The INDIANA LAW REVIEW is the property of Indiana University and is published six times yearly, November, December, January, March, April, and May, by the Indiana University Indianapolis Law School which assumes complete editorial responsibility therefor.

Subscription Rates: one year \$9.50; three years, \$25.00; five years \$33.00; Canadian, \$9.50; foreign, \$11.00. Single copies, \$2.00. Back issues, volume 1 through volume 7, number 1, are available from Fred B. Rothman & Co., 57 Leuning Street, South Hackensack, New Jersey 07606.

Send all correspondence to Business Manager, *Indiana Law Review*, Indiana University Indianapolis Law School, 735 West New York Street, Indianapolis, Indiana 46202.

Publication Office: 735 West New York Street, Indianapolis, Indiana 46202.

Second-class postage paid at Indianapolis, Indiana 46201.

Volume 7 April 1974 Number 5

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## INDIANA LAW REVIEW

SECTION 235 HOUSING: ONE EMPIRICAL STUDY WITH  
RECOMMENDATIONS FOR THE FUTUREANNE C. SINGER,\* EVERETT E. LANDON,\*\* AND  
JANET E. GRAHAM\*\*\*

## I. INTRODUCTION

In a country in which a "person's home is his castle," and in which the health of the housing construction industry is a major indication of economic stability, it is not surprising that Congress has enacted legislation to aid the poor in obtaining their own homes.<sup>1</sup> Surprisingly, aside from a small-scale experiment some years earlier<sup>2</sup> it was not until 1968, after two summers of urban riots and in the midst of a severe housing slump, that Congress took major steps in this direction. In that year, attempting to promote for low-income families a developing sense of dignity as well as hard work, thrift, family solidarity, and a "stake in the community,"<sup>3</sup> Congress promulgated section 235 of

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This study was conducted under a research grant from the American Bar Foundation. The analyses, conclusions, and opinions expressed are those of the authors and not the Foundation, its officers, and directors or others associated with its work.

<sup>1</sup>In 1934, Congress passed the National Housing Act, ch. 847, 48 Stat. 1246 (1934), as amended, 12 U.S.C. §§ 1701, 1715l, 1715z 1735b (1970).

<sup>2</sup>The National Housing Act was amended in 1966 to provide for a limited, experimental program, authorizing FHA-insured mortgages to nonprofit organizations for purchase and rehabilitation of substandard houses for resale to low-income families. 12 U.S.C. § 1715l(h) (1970).

<sup>3</sup>See Berger, *Homeownership for Lower Income Families: The 1968 Housing Act's "Cruel Hoax,"* 2 CONN. L. REV. 30 (1969); Butler, *An Approach to Low and Moderate Income Home Ownership,* 22 RUTGERS L. REV. 67, 68 (1967); Note, *Government Programs to Encourage Private Investment in Low-Income Housing,* 81 HARV. L. REV. 1295, 1319 (1968); 20 CASE W. RES. L. REV. 494, 495 (1969).

the National Housing Act,<sup>4</sup> providing subsidies for middle- and low-income home purchasers.<sup>5</sup> It was the first major step which

<sup>4</sup>Act of Aug. 1, 1968, Pub. L. No. 90-488, § 235, 82 Stat. 477, *codified at* 12 U.S.C. § 1715z (1970). The more relevant portions of this section are as follows:

§ 1715z. *Homeownership or membership in cooperative association for lower income families—Authorization for periodic assistance payments to mortgagees*

(a) For the purpose of assisting lower income families in acquiring homeownership or in acquiring membership in a cooperative association operating a housing project, the Secretary is authorized to make, and to contract to make, periodic assistance payments on behalf of such homeowners and cooperative members. The assistance shall be accomplished through payments to mortgagees holding mortgages meeting the special requirements specified in this section.

*Qualifications and eligibility requirements for assistance payments*

(b) To qualify for assistance payments, the homeowner or the cooperative member shall be of lower income and satisfy eligibility requirements prescribed by the Secretary, and—

(1) the homeowner shall be a mortgagee under a mortgage which meets the requirements of and is insured under subsection (i) or (j) (4) of this section . . . .

*Limitation on payments on behalf of mortgagor; occupancy of property; maximum amount of payment*

(c) The assistance payments to a mortgagee by the Secretary on behalf of a mortgagor shall be made during such time as the mortgagor shall continue to occupy the property which secures the mortgage . . . . The payment shall be in an amount not exceeding the lesser of—

(1) the balance of the monthly payment for principal, interest, taxes, insurance, and mortgage insurance premium due under the mortgage remaining unpaid after applying 20 per centum of the mortgagor's income; or

(2) the difference between the amount of the monthly payment for principal, interest, and mortgage insurance premium which the mortgagor is obligated to pay under the mortgage and the monthly payment for principal and interest which the mortgagor would be obligated to pay if the mortgage were to bear interest at the rate of 1 per centum per annum.

. . . .

*Adoption of procedures for recertifications of mortgagor's or cooperative member's income*

(f) Procedures shall be adopted by the Secretary for recertifications of the mortgagor's (or cooperative member's) income at intervals of two years (or at shorter intervals where the Secretary deems it desirable) for the purpose of adjusting the amount of such assistance payments within the limits of the formula described in subsection (c) of this section.

. . . .

Congress had taken toward the goal of "a decent home and a suitable living environment for every American family,"<sup>6</sup> a goal first proclaimed in the Housing Act of 1949.<sup>7</sup>

*Authorization of appropriations; aggregate amount of assistance payment contracts; maximum income limits of families; annual report to Congressional Committees with respect to income levels; limitation on payments with respect to existing dwellings or dwelling units in existing projects*

(h) (1) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section, including such sums as may be necessary to make the assistance payments under contracts entered into under this section. The aggregate amount of contracts to make such payments shall not exceed amounts approved in appropriation Acts, and payments pursuant to such contracts shall not exceed \$75,000,000 per annum prior to July 1, 1969, which maximum dollar amount shall be increased by \$100,000,000 on July 1, 1969, and by \$125,000,000 on July 1, 1970.

(3) . . . . [N]ot more than—

(A) per centum of the total amount of contracts for assistance payments authorized by appropriation Acts to be made prior to July 1, 1969,

(B) 15 per centum of the total additional amount of contracts for assistance payments authorized by appropriation Acts to be made prior to July 1, 1970, and

(C) 10 per centum of the total additional amount of contracts for assistance payments authorized by appropriation Acts to be made prior to July 1, 1971,

may be made with respect to existing dwellings, or dwelling units in existing projects.

*Insurance of mortgages executed by mortgagors meeting eligibility requirements for assistance payments; issuance of commitment; eligibility requirements for insurance*

(i) (1) The Secretary is authorized, upon application by the mortgagee, to insure a mortgage executed by a mortgagor who meets the eligibility requirements for assistance payments prescribed by the Secretary under subsection (b) of this section.

*Deductions for minors in determining income limits; exclusion of earnings of minors*

(1) In determining the income of any person for the purposes of this section, there shall be deducted an amount equal to \$300 per each minor person who is a member of the immediate family of such person and living with such family, and the earnings of any such minor person shall not be included in the income of such person or his family.

Note that section 235 also covers membership in a cooperative housing association. *Id.* §§ 1715x(b) (2), (d). But these subsections are not relevant to this study.

The goal, however, was not to help *every* American family, but only the low-income family. Limits were placed upon the annual income which a family might receive and still be eligible to benefit from the Act. A purchaser's income could not exceed 135 percent of the public housing limit for initial occupancy in a given geographical area, with one limited exception for slightly more affluent families.<sup>8</sup> To determine eligibility, a deduction of \$300 for each minor child was made from the applicant's gross income.<sup>9</sup> Social security taxes, unusual or temporary income, and earnings of minors were also deducted before the eligibility figure, called adjusted gross income, was ascertained.<sup>10</sup> Moreover, the financial status of the purchaser would be reviewed once every two years to adjust the subsidy.<sup>11</sup> Finally, the putative purchaser must be able to afford a \$200 down payment.<sup>12</sup>

Although many purchasers in fact misunderstood the role of the FHA by fancifully attributing to it an involvement, and even

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For a good basic discussion of how section 235 works, see Schafer & Field, *Section 235 of the National Housing Act: Homeownership for Low Income Families?*, 46 J. URBAN L. 667 (1969). For an excellent, detailed account, see C. EDSON & B. LANE, *A PRACTICAL GUIDE TO LOW- AND MODERATE-INCOME HOUSING* (1972) [hereinafter cited as EDSON & LANE].

<sup>5</sup>Some observers have argued that it is too risky for low-income families to own their own houses, and that they should not be encouraged to do so. This assumption appears to be unjustified, as pointed out by Kolodny, *Should Poor Families Own?*, in *HOMEOWNERSHIP FOR THE POOR* 190 (C. Abrams ed. 1970). Kolodny demonstrates that modern changes in the mortgage system make low-income homeownership feasible: (1) mortgages extend for longer periods, (2) they are self-liquidating, *i.e.*, no deficiency judgment results on FHA mortgages when the house is sold, and (3) downpayments are low. *Id.* at 197. Whether homeownership is risky, concludes Kolodny, depends only on whether the payment is within the family's means.

<sup>6</sup>42 U.S.C. § 1441 (1970). This statement is reiterated in the Housing and Urban Development Act of 1968, 12 U.S.C. § 1701t (1970).

<sup>7</sup>Act of July 15, 1949, ch. 338, § 2, 63 Stat. 413, *as amended*, 42 U.S.C. § 1441 (1970).

<sup>8</sup>Twenty percent of authorized funds can be used to aid families whose incomes exceed the 135 percent limitation. 12 U.S.C. § 1715z(h)(2) (1970).

<sup>9</sup>*Id.* § 1715z-1(m).

<sup>10</sup>HUD, *HOMEOWNERSHIP FOR LOWER-INCOME FAMILIES*, No. 444.1, at 12, *cited in* Krooth & Sprogens, *The Interest Assistance Programs—A Successful Approach to Housing Problems*, 39 GEO. WASH. L. REV. 789, 802 n.80 (1971) [hereinafter cited as Krooth & Sprogens, *Housing Problems*].

<sup>11</sup>12 U.S.C. § 1715z(f) (1970).

<sup>12</sup>*Id.* 1715z(i)(3)(C)(i). For the purchaser whose income exceeds the 135 percent level, the downpayment must be three percent of the acquisition cost. *Id.* § 1715z(i)(3)(C)(ii).

a guarantee of housing quality, which in reality never existed, the method by which purchasers obtain their federal assistance is relatively easy to understand. The mortgagor-purchaser is required to pay to the mortgagee a figure equivalent to twenty percent of the mortgagor's monthly income.<sup>13</sup> HUD, through the FHA, pays the balance between that sum and the actual mortgage payment. In no instance, however, may the government pay more than the difference between the actual monthly payment under the mortgage and what the monthly payment would be if the mortgage were at a one percent interest rate.<sup>14</sup> Thus, if the interest rate were one percent, there would be no subsidy. HUD has estimated that the average monthly subsidy resulting from this formula is \$50.<sup>15</sup>

Aside from paying the subsidy, the only role that the FHA plays in the purchase transaction is to insure to the mortgagee repayment of the full amount of the loan in the event the buyer defaults.<sup>16</sup> The FHA appraisers inspect the property sold under

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The payment shall be in an amount not exceeding the lesser of—

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(2) the difference between the amount of the monthly payment for principal, interest, and mortgage insurance premium which the mortgagor is obligated to pay under the mortgage and the monthly payment for principal and interest which the mortgagor would be obligated to pay if the mortgage were to bear interest at the rate of 1 per centum per annum.

*Id.* § 1715z(c).

<sup>14</sup>*Id.* § 1715z(c) (2).

<sup>15</sup>*Hearings on Housing and Urban Development Legislation and Urban Insurance Before the Subcomm. on Housing of House Comm. on Banking and Currency*, 90th Cong., 2d Sess. 172 (1968).

<sup>16</sup>*See* 12 U.S.C. § 1715z(j) (1970). For a case holding that the only purpose of the FHA inspection is to protect the FHA itself and that the FHA owes the purchasers no duty to inspect the premises for proper construction because it is not in privity with them, see *United States v. Neustadt*, 366 U.S. 696, 709 (1961). In *Neustadt*, the Court reasoned that the Federal Tort Claims Act, 28 U.S.C. § 2860(h) (1970), did not sanction any suit arising out of a claim of misrepresentation by the Government. This holding itself has important implications for section 235 purchasers. In *Johnson v. FHA*, 128 Colo. 144, 261 P.2d 161 (1953), the Supreme Court of Colorado stated that the only contract entered into by the FHA was with the bank in insuring its loan and that the purchasers could not be considered third party beneficiaries

the program but do so for the limited purpose of insuring that the value of the property exceeds the government's obligation. In fact, the FHA has no direct contact with the purchaser in the typical section 235 transaction. As suggested later, this isolationist approach may well be at the root of section 235 difficulties.<sup>17</sup>

New, existing, and rehabilitated housing can be purchased under the section 235 program. When Congress established the program in 1968, intending that new housing would receive an even greater percent of the funds in later years, it limited the funds which could be expended for existing housing to twenty-five percent of the section 235 budget.<sup>18</sup> In 1969, the statute was amended to permit greater support for the existing housing com-

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of this contract. *See also* *United States v. Chelsea Towers, Inc.*, 295 F. Supp. 1242, 1247-48 (D.N.J. 1967).

In *Davis v. Romney*, 490 F.2d 1360 (3d Cir. 1974), the court denied monetary damages to plaintiffs who had bought homes under sections 235 and 221(d), which did not meet Philadelphia Housing Code standards. Section 221(d)(2), incorporated by reference into section 235, requires that the FHA-guaranteed mortgage be secured by property which meets the standards of state laws and local ordinances. Although plaintiffs' properties did not comply with this requirement, the *Davis* court held that the statutory standard was not intended to protect the homeowner, but rather to assure the United States adequate collateral. However, because the FHA had not made even minimal efforts to discover whether the houses met the standards imposed by local ordinances, narrowly drawn injunctive relief would be available. *See also* *Jackson v. Romney*, 355 F. Supp. 737 (D.D.C. 1973).

The United States District Court for the District of Columbia has held that the FHA has a duty to inspect homes sold under section 235 by virtue of 12 U.S.C. § 1735(b) (1970) (referred to in the literature both as section 518 and section 104 of the Housing Act of 1970). *Bailey v. Romney*, 359 F. Supp. 596 (D.D.C. 1973). The court distinguished *Neustadt* on the grounds that the *Neustadt* claim arose under the Federal Tort Claims Act. The court said that section 104 (section 518) "recognized the abuses in the § 235 Program and provided a [specific] remedy." *Id.* at 600.

*See Note, Abuses in the Low Income Homeownership Programs—The Need for a Consumer Protection Response by the FHA*, 45 TEMPLE L.Q. 461, 467 (1972), for a discussion of a provision in the FHA manual which states that the FHA inspection is primarily for the purpose of eliminating "conditions threatening the continued economic soundness of the mortgage transaction," and secondarily "to protect the health and safety of the occupants." *But see Note, Liability of the Institutional Lender for Structural Defects in New Housing*, 35 U. CHI. L. REV. 739 (1968), for a statement and analysis of the theory that the lender who makes the inspection, supposedly for his own purposes, should be liable to the buyer in the case that the inspection fails to disclose faulty construction of the new housing.

<sup>17</sup>*See* note 99 *infra* & accompanying text.

<sup>18</sup>Act of Aug. 1, 1968, Pub. L. No. 90-448, § 235(h)(3), 82 Stat. 479, codified at 12 U.S.C. § 1715z(h)(3) (1970).

ponent for 1970 and 1971.<sup>19</sup> While there was no statutory minimum price on houses purchased under the program, statutory maximums ranged from \$18,000 to \$24,000, depending on family size, family income, location of the house, and the year of purchase.<sup>20</sup> In this study, which the authors will refer to as the Cincinnati Study, homes ranged in price from \$7,000 to \$24,000.

Within two years after the inauguration of this "new era in housing," however, the program was vigorously attacked by the media,<sup>21</sup> Congress,<sup>22</sup> and HUD itself.<sup>23</sup> Congressional hearings held by the House Committee on Banking and Currency, chaired by Representative Wright Patman,<sup>24</sup> redounded with charges of widespread corruption in the pricing of the homes for which subsidies were issued, in the acquisition of huge profits by housing speculators, in the disillusionment and distress of purchasers, and in the unnecessary dissipation of federal funds. According to these reports, the concept that only two years earlier was intended to give millions of citizens a "stake in the community" apparently had given them only financial insecurity and overpriced homes. The hearings disclosed numerous examples of houses that had been bought at costs of \$2000 to \$4000, "cosmetized,"<sup>25</sup> and then re-sold through section 235 at prices ranging from \$12,000 to \$16,000.

Normal checks on such chicanery were not present. Lending institutions whose inspectors normally would have discovered this fraud were unconcerned, since the FHA was insuring the loan at 100 percent. Furthermore, the FHA was responsible, at least in-

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<sup>19</sup>Act of Dec. 24, 1969, Pub. L. No. 91-152, § 109, 83 Stat. 381, *codified at* 12 U.S.C. § 1715z(h) (3) (1970).

<sup>20</sup>12 U.S.C. § 1715z(b) (2) (1970).

<sup>21</sup>*See, e.g., "Sixty Minutes,"* CBS Television, Jan. 5, 1971; *Wall Street Journal*, Sept. 12, 1972, at 40, col. 1.

<sup>22</sup>*See, e.g.,* STAFF OF HOUSE COMM. ON BANKING AND CURRENCY, 91ST CONG., 2D SESS., INVESTIGATION AND HEARING OF ABUSES IN FEDERAL LOW- AND MODERATE-INCOME HOUSING PROGRAMS (Comm. Print 1970) [hereinafter cited as 1970 HEARINGS]. The Report paints a generally dim picture of the program as viewed in its early stages by this Committee.

<sup>23</sup>HUD, OFFICE OF AUDIT, AUDIT REVIEW OF SECTION 235 SINGLE FAMILY HOUSING, No. 05-2-2001-4900 (1971) [hereinafter cited as AUDIT REVIEW]. This study reports that many appraisals were defective, that supervision and review over the appraisers was insufficient, and that the attitudes of FHA personnel were improper. *Id.* at 4-6.

<sup>24</sup>1970 HEARINGS, *supra* note 22.

<sup>25</sup>*Id.* at 3, 29.

directly, for inspections and appraisals which did not fairly represent the condition of the property or its true value.<sup>26</sup>

Although unconscionable, the abuses of overpricing might not by themselves have been intolerable to the poor in light of the substantial FHA subsidy. However, in addition to purchasing an overpriced house, the poor found that they often had acquired a home which required costly repairs. Although an underlying rationale for the section 235 program was that homeownership would have advantageous auxiliary benefits by instilling pride of homeownership, the homes described in the hearings were not likely to provide inspiration for anyone. All too often, buyers walked away from their purchases. Fallen ceilings, faulty furnaces, wiring that violated municipal housing codes, plumbing that had to be repaired, and porches that had to be replaced comprise examples of defects found by the Committee investigators.<sup>27</sup> Many of these defects were so serious that they caused the newly purchased home to be deemed unfit for habitation under municipal housing codes.

These abuses spurred Congress in December, 1970, to authorize expenditures "to correct or to compensate the owner for structural or other defects which seriously affect the use and livability [of homes],"<sup>28</sup> if the defect existed at the time of the issuance of the insurance commitment and had not been discovered because of sloppy inspection techniques. This new provision, section 104 of the Housing Act of 1970,<sup>29</sup> might have aided many families who were so despondent over the condition of their homes that they moved out or accepted foreclosure as the only solution. Unfortunately, the provision required that such homeowners file a claim for repairs within one year of their purchase date,<sup>30</sup> a requirement which often went unsatisfied because of faulty and delayed notification processes.<sup>31</sup> Thus, even the remedy which carried so much hope seemed to be too little, too late.

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<sup>26</sup>*Id.* at 1. Some FHA officials have been indicted and convicted for taking bribes in connection with their work administering the section 235 program. N.Y. Times, Dec. 13, 1973, § 1, at 53, col. 1.

<sup>27</sup>1970 HEARINGS, *supra* note 22.

<sup>28</sup>12 U.S.C. § 1735b(b) (1970).

<sup>29</sup>Act of Dec. 31, 1970, Pub. L. No. 91-609, § 104, 84 Stat. 1771, *codified at* 12 U.S.C. § 1735b (1970). This section is also referred to in the literature as section 518.

<sup>30</sup>12 U.S.C. § 1735b(b) (1970).

<sup>31</sup>*See* note 70 *infra* for results of this study on this point. In addition, section 104 is too limited in scope and may even be inadequate to protect the homeowner who was victimized by deliberate concealment, since the section

Thus, in late 1971, section 235 stood badly scarred, berated by those who had always expected the project to fail, and mourned by those who had hoped that it would succeed. But many questions remained in need of substantive answers if the program was to be objectively evaluated. Prior studies of the program had investigated or reported only dramatic failures and tales of corruption and graft.<sup>32</sup> Were these accounts typical or were they a "parade of horrors" brought forth by those who sought the suspension of the program?

Attempting to find answers to some of these questions, these authors, supported by generous funding from the American Bar Foundation, conducted empirical research into the actualities of section 235 housing in the Cincinnati area. The purpose was not simply to determine whether the interest subsidy method utilized by section 235 as a specific statutory provision was viable but rather to determine whether the entire approach of the Housing Act of 1968, which relied upon the poor to make and live with their own housing choices, was legitimate. The rest of this Article is a report of that study.

Despite the President's suspension of funding<sup>33</sup> for the section 235 program in early 1973, and his recent proposal to substitute direct subsidies to the poor for the section 235 interest subsidy,<sup>34</sup>

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will only remedy defects which "proper inspection could reasonably be expected to disclose." 12 U.S.C. § 1735b(b) (1970). This problem is raised in AUDIT REVIEW, *supra* note 23, at 48.

One final serious bar to section 104's effectiveness arose from the regulations promulgated by the Secretary of HUD, pursuant to 12 U.S.C. § 1735(c) (1970). These regulations provided that the Secretary would evaluate reimbursement claims for defects in light of "the extent to which the defects presented a clear and present danger to the occupants," among other considerations. However, the District Court for the District of Columbia has recently held that this standard is unduly restrictive and contrary to the legislative intent mirrored in section 104. It enjoined the application of this standard. *Bailey v. Romney*, 359 F. Supp. 596 (D.D.C. 1973).

<sup>32</sup>See generally 1970 HEARINGS, *supra* note 22.

<sup>33</sup>Remarks Prepared for Delivery by George Romney, Secretary of HUD at the Twenty-Ninth Annual Convention Exposition of the National Association of Home Builders Astroworld, Houston, Texas, Jan. 8, 1973.

<sup>34</sup>N.Y. Times, Sept. 23, 1973, § 4, at 4, col. 3. Under the direct subsidy approach, the federal government would provide cash to qualified recipients and allow them to choose their own homes on the private market. It is beyond the scope of this Article to compare the advantages of the interest subsidy with those of the direct subsidy. Critiques of direct subsidies can be found in Gans, *A Poorman's Home is His Poorhouse*, N.Y. TIMES MAGAZINE, Mar.

the Cincinnati Study has continuing significance. Perhaps it even has heightened importance at this time of reexamination of the housing problem, for there is certain to be continuing debate over the best and most economical means to assist the poor in attaining adequate shelter. Many members of Congress still favor the interest subsidy method, and within a few days of the announcement of the administration's proposed direct subsidy, critics of the new program became vocal.<sup>35</sup>

Regardless of the final outcome of the direct subsidy versus interest subsidy battle, a minor battle is presently being waged in the courts over the legality of the suspension of funds for the section 235 program. Two suits on this question have been filed. In *Pennsylvania v. Lynn*,<sup>36</sup> defendant Lynn, Secretary of HUD, was enjoined from refusing to accept applications for subsidies and was ordered to process these new applications as well as existing ones. In so holding, the court found without merit his contentions of lack of standing, political question, and sovereign immunity. The court concluded that it was not within the Secretary's discretion to suspend the funds since "the Congressional mandate requires that [the programs] be operated on a continuing basis."<sup>37</sup> The detailed account of legislative history recited by the court strongly supported this conclusion. The court further stated that it was not "within the discretion of the Executive to refuse to execute laws passed by Congress but with which the Executive presently disagrees."<sup>38</sup> After this decision was rendered, the order to process applications for section 235 funds was stayed pending appeal in the United States Court of Appeals for the District of Columbia.<sup>39</sup> A second case to force release of suspended funds, *City of Camden v. Lynn*,<sup>40</sup> is still at an early stage of litigation, no decision having been rendered at the time of this writing. Clearly

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31, 1974, at 20; N.Y. Times, Apr. 2, 1974, § 1, at 15, col. 1. For the results of an experimental direct subsidy project, see HUD, FIRST ANNUAL REPORT OF THE EXPERIMENTAL HOUSING ALLOWANCE PROGRAM (1973).

<sup>35</sup>N.Y. Times, Sept. 23, 1973, § 4, at 4, col. 3.

<sup>36</sup>362 F. Supp. 1363 (D.D.C. 1973), *motion to stay denied*, No. 1835 (D.C. Cir., Aug. 21, 1973), *stayed*, No. 230 (Mr. Chief Justice Burger, Aug. 29, 1973). *But cf.* Housing Authority v. HUD, 340 F. Supp. 654 (N.D. Cal. 1972).

<sup>37</sup>362 F. Supp. at 1369.

<sup>38</sup>*Id.* at 1372.

<sup>39</sup>No. 1835 (D.C. Cir., Aug. 17, 1973), *stayed*, No. 230 (Mr. Chief Justice Burger, Aug. 29, 1973).

<sup>40</sup>No. 961 (D.N.J., filed June 29, 1973).

section 235 has not yet been put to death; the battle has yet to be waged.

## II. METHODOLOGY

Several preliminary points of methodology must be noted, for it is on these points that the Cincinnati Study differs significantly from those which preceded or paralleled it. First, this study, unlike others thus far published,<sup>41</sup> maintained "control" groups against which to measure findings relating to section 235 purchasers. It was not enough to show, as the critics maintained, that section 235 purchasers were being subjected to substandard housing. If persons who bought similar housing but were not being subsidized by the Housing Act were suffering from the same ills and deceits, then the weakness lay not in the provisions of the Act, but in the type of market which was being studied. If, for example, a critic of section 235 pointed to statistics that X percent of all such houses were foreclosed within one year but could not show that the percentage of foreclosures for comparable non-235 houses was less, the only conclusion possible would be that section 235 was not being used by speculators and realtors to bleed the poor any more or any less than they would have been bled without it. And if the rate for non-235 housing were equal to or higher than that for section 235 housing, then perhaps section 235 could even be said to be a blessing for its clients, even if X percent were "too high" on an absolute scale.

Two control groups of forty interviewees each, chosen to correspond with the new and existing section 235 groups, were surveyed. These control groups were chosen by selecting, from land record plat books, houses purchased as close in time and locale to section 235 purchases as possible. The times of purchase were within the time span of the section 235 program being studied, from 1969 to 1972.

A second major difference between the Cincinnati Study and others is that its authors were fortunate enough to obtain interviews with a substantial number of persons whose mortgages had been foreclosed after the purchase of section 235 houses. Although difficult to locate because such foreclosed owners often do not leave forwarding addresses, the interviews with these prior owners provide some fresh insight into the success or failure of

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<sup>41</sup>Note, *The 235 Housing Program in Action: An Empirical Study of its Administration and Effect on the Homeowner-Participant in the Columbia, South Carolina Area*, 25 S.C.L. REV. 93 (1973) [hereinafter cited as *Columbia Study*]. See generally 1970 HEARINGS, *supra* note 22.

section 235. Sixty-seven persons in Hamilton County, Ohio, had left section 235 houses. Sixty had left from old houses; seven from new. A rate of 5.6 percent vacated homes, included a foreclosure rate of about five percent, since one or two of the sixty-seven were voluntary sales.<sup>42</sup> Thirty-one of the sixty-seven persons were located and interviewed, a “finding rate” of nearly fifty percent.

The methodology employed in this study was as follows. First, records of the FHA in Hamilton County were examined and revealed a total of 1,214 homes which had been purchased under section 235 between April, 1960, the start of the program in Cincinnati, and May, 1972. Of these, 636 were new houses and 578 were existing houses. Although the Act provided for the same subsidy in the case of rehabilitated houses,<sup>43</sup> such houses were not part of the Cincinnati program. From each of the two groups, new and existing, forty names were randomly drawn. When a potential interviewee could not be contacted or was contacted and refused the interview, a replacement name was drawn randomly, in order to maintain the sample size at forty.

Finally, because of an interest in ascertaining whether buyers who had purchased homes which eventually required repairs under section 104 had special characteristics,<sup>44</sup> another category was added. Forty interviewees were randomly selected from a pool of the 108 buyers who had received section 104 repairs in Hamilton County. Thus, at the outset there were the following six categories of interviewees:

	<i>Total number from which sample drawn</i>	<i>Percent of total</i>	<i>Number of interviewees</i>
<i>Section 235 purchasers</i>			
1. Purchasers of new homes .....	629	51.8	40
2. Purchasers of existing homes ..	410	33.8	40
3. Purchasers whose homes required § 104 repairs .....	108	8.9	40
4. Purchasers foreclosed			
2. New homes .....	7	0.6	
b. Existing homes .....	60	4.9	31
<i>Control purchasers</i>			
5. Purchasers of new homes .....			40

<sup>42</sup>Compare this rate to the rate in Philadelphia, for example, where the rate of foreclosure was just under eight percent. See Stegman, *Low-Income Ownership: Exploitation and Opportunity*, 50 J. URBAN L. 370, 376 (1973). Apparently Cincinnati’s section 235 program has fewer problems than those in Philadelphia.

<sup>43</sup>12 U.S.C. § 1715z(h) (3) (1970)..

<sup>44</sup>See note 29 *supra* & accompanying text.

6. Purchasers of existing homes . . .	40
<i>Total interviewees</i> . . . . .	231

The sample, then, upon which this report is based numbers 231 which includes thirty-one persons in the “foreclosed” category, and forty persons each in the other five categories. Although fairly small, this sample is statistically sound. Indeed, some of the more general findings which are reported here have appeared in other reports.<sup>45</sup> In any event, given the resources and time at the authors’ disposal, an attempt was made to interview as many people as possible. Of the total number of section 235 purchasers in Hamilton County, more than thirteen percent were interviewed and approximately twenty percent of the entire number were either contacted or sought to be contacted. The actual interview consisted of approximately one hundred questions and lasted from twenty-five to forty-five minutes each. They were conducted during the summer of 1972.

III. WHO IS SECTION 235 HELPING?

A. *Is It Reaching Those for Whom It Was Primarily Intended?*

As already suggested, one of the primary purposes of section 235, and indeed of the entire Housing Act of 1968, was to give low-income families a “stake in the community.”<sup>46</sup> In light of the tenor of the times in which the Act was passed, manifested in part by mounting tensions in the ghetto areas, it is also likely that blacks

<sup>45</sup>For replication of some, but not all, of the data, see *Columbia Study*, *supra* note 41. See also U.S. COMM’N ON CIVIL RIGHTS, HOMEOWNERSHIP FOR LOWER-INCOME FAMILIES (1971). Similar surveys of section 235 purchasers nationwide have been done by HUD itself. One survey done of buyers in the third quarter of fiscal 1969 revealed that the typical section 235 purchaser had a family of five members, made an annual income of \$5,685, and bought a house for \$15,000. R. TAGGART, LOW-INCOME HOUSING: A CRITIQUE OF FEDERAL AID 78 (1970). Another study done in the first quarter of 1971 showed an average family whose head of household was twenty-nine years old, earned an annual income of \$6,150, and bought a house for \$17,808. It revealed an average family size of four in new housing and six in older housing. Of these buyers seventy-eight percent were married couples, with twenty-one percent described at “other types.” EDSON & LANE, *supra* note 4, at 5:9. The data in the Cincinnati Study is generally comparable in all areas to the earlier studies, except that annual salaries of section 235 purchasers in Cincinnati were found to be slightly higher than the above reports indicated for their subjects.

<sup>46</sup>*Hearings on H.R. 15624, H.R. 15625 and Related Bills Before the Subcomm. on Housing of the House Comm. on Banking and Currency, 90th Cong., 2d Sess., pt. 1, at 77 (1968).*

were intended to be primary beneficiaries. To determine whether the program was reaching the people it sought to reach, the authors investigated the income and occupation of both the experimental and control groups, as well as the homeownership history, both immediate and distant past, of the purchasers involved. The racial makeup of the sample will be considered in the next subsection.

The findings on income levels were striking. There was a marked difference, on the average approximately \$5,000 annually, between the incomes of the experimental 235 groups and the incomes of their respective controls. Between the two sets of comparable control and experimental groups, the difference was especially noteworthy. While the average weekly income of the section 235 purchaser of existing housing was \$152, that of the control purchaser of existing housing was \$242, a difference of \$4,600 per year. The statistics indicate a difference of over \$3,700 per year between control and section 235 purchasers of new homes. Those purchasers whose experience went sour, either through foreclosure or significant repairs, were substantially poorer than those in any of the other groups. This is made clear by examining in Table I the average weekly per capita incomes of these groups, which ranged from \$17 per person per week in section 104 houses to \$78 per person per week in new control purchases.

One significant factor which may account for much of the difference in income between existing section 235 purchasers and existing control purchasers is that the controls tended to be families in which both spouses were employed, while the section 235 families were not. While only three families in the existing section 235 sample reported that both spouses worked, sixty-three percent of the existing controls had income from two working spouses. In addition, a much larger percentage of section 235 houses were purchased by single women whose earnings tended to be lower than those of their male counterparts. In new section 235 housing, ten percent of the families had two working spouses, while both spouses were employed in twenty-eight percent of the new controls.<sup>47</sup>

*Table I: Income*

	<i>Weekly income (\$)</i>	<i>Annual income (\$)</i>	<i>Per capita income/week (\$)</i>
<i>Section 235 purchasers</i>			
New .....	162	8,424	40
Existing .....	152	7,904	25
§ 104's .....	125	6,500	17

<sup>47</sup>The income of minors is not included in the section 235 subsidy formula and so this study has not examined this possible source of additional income.

Foreclosed .....	136	7,072	19
Control purchasers			
New .....	234	12,168	78
Existing .....	242	12,584	60

While needy families in the Cincinnati area are being helped by section 235, it is immediately clear from Table I that the Cincinnati sample has a much higher average income than a comparable sample obtained in other areas of the country.<sup>48</sup> These high average incomes may indicate that the program is not reaching as many hard-core poor as Congress had intended.

Nevertheless, other data indicates unequivocally that the program is giving a “stake in the community” to those who did not have such a stake prior to their involvement in the program. For example, Table II shows that virtually none of the section 235 purchasers in any group had lived in his own home prior to his section 235 purchase, while a substantial number of control purchasers and owned previous homes. Further data in this table reaffirms what the income analysis indicated, namely, that even though average incomes of people helped by section 235 may not be as low as Congress might have wished, low-income recipients are indeed benefiting from it. Between eight to twenty-five percent of the section 235 purchasers, depending upon the group, had been living in public housing prior to their purchase. Only a negligible number of control purchasers had done so.

Table II: Prior Homeowning Experience

Section 235 purchasers	Percent owning prior at least one set of houses		Percent having Immediately prior home (%)			
			Public housing	Private apartment	Rent home	Own home
New .....	10	95	8	70	18	5
Existing .....	20	50	25	50	23	0
§ 104's .....	10	58	15	45	35	5
Foreclosed ....	16	83	16	55	26	3

<sup>48</sup>A second empirical study was funded by the American Bar Foundation in the summer of 1972. See *Columbia Study*, *supra* note 41. Although it is not clear whether the Columbia Study's sample of 400 new house buyers and 100 existing house buyers was representative of the actual Columbia, South Carolina, section 235 population, that study showed that seventy-three percent of those respondents had incomes from \$3,000 to \$7,000, while only sixteen percent earned over \$7,000 per year. *Id.* at 106. This is in marked contrast to the Cincinnati income levels even though Columbia, South Carolina, is a Southern city and would be expected to have a somewhat lower average income. See also U.S. COMM'N ON CIVIL RIGHTS, HOME-OWNERSHIP FOR LOWER INCOME FAMILIES 29 (1971), which included new and existing housing and reported a 1969 average income of \$5,579 in four cities—Denver, St. Louis, Little Rock, and Philadelphia.

*Control  
purchasers*

New .....	15	95	2	63	15	15
Existing .....	30	80	5	57	25	13

The figures on parents' homeownership experiences further differentiate section 235 purchasers from control purchasers, at least in the category of existing housing. Although Table II indicates that a majority of all purchasers interviewed had at least one set of parents who owned a house at one time in their lives, the figures for the control purchasers are generally higher than those for the section 235 purchasers. If the purchasers of new section 235 housing, who are white, young married couples, and almost indistinguishable from their control counterparts, are removed from the survey, the impact is more apparent: section 235 is reaching almost double the number of persons whose parents did not own a house at any time in their lives. This must affirm the view that the program is bringing a new dimension to the lives of these purchasers.

*B. General Description of the Section 235 Sample*

The data which is reported in Table III following this summary supports the following conclusions about the sex, race, age, and educational levels of each of the four kinds of section 235 purchasers:

1. *Purchasers of existing 235 housing.*—Although statistically a majority of these purchasers are married couples, a startlingly high percentage are single women. The purchasers in this sample tend to be black, older than the average homeowner, with a weaker educational background.

2. *Purchasers of housing which required repairs under section 104.*—This group is similar to that described above except that it tends to be even more nonwhite and somewhat younger.

3. *Purchasers of housing which was foreclosed.*—This group, again, is highly female, predominantly black, with a marginal educational background, and middle aged.

4. *Purchasers of new housing under section 235.*—These purchasers stand out in striking contrast to the other three groups. They are white, young married couples with a substantially higher degree of education.

*Table III: The Purchasers*

<i>Section 235 purchasers</i>	<i>Percent female</i>	<i>Percent nonwhite</i>	<i>Average age</i>	<i>Educational level (average highest grade completed)</i>	<i>Average family size</i>
New .....	5	5	21-30	12	4

Existing .....	48	65	41-50	10	6
§ 104's .....	45	73	31-40	10	7
Foreclosed ....	39	52	31-40	10	7
<i>Control</i>					
<i>purchasers</i>					
New .....	0	2	21-30	some college	3
Existing .....	5	53	31-40	12	4

In comparing the section 235 purchaser to the control purchaser, the following generalizations seem warranted: control purchasers both in existing and new housing, but particularly in the latter category, are better educated, younger, almost all married couples, in smaller family units, and more likely to be white than their section 235 counterparts. In dealing with each of the characteristics separately, the authors conclude the following:

1. *Sex*.—Section 235 has allowed a substantial number of women to purchase homes, possibly many with large families.

2. *Race*.—Section 235 has substantially helped blacks move into existing housing, but when new housing is concerned, whites have taken advantage of the program to the virtual exclusion of blacks.

The FHA has been criticized for its role in creating racially isolated inner cities or, on the other hand, for moving racially isolated groups from the inner city to a similar "suburban ghetto."<sup>49</sup> The section 235 program appears to be continuing the disturbing pattern, although there was less segregation in new section 235 housing than in new control housing. In fact, in the new developments which housed predominantly section 235 buyers, the sight of black and white children playing together was fairly common. Nevertheless, the data points to a significant level of isolation of the races.

Pinpointing the reasons for this isolation is difficult. No overt discrimination was apparent. Most likely, it resulted simply from the higher income requirement which was a prerequisite to buying the more expensive new houses, a requirement which most blacks probably could not meet. Other reasons may include a lack of awareness in the black community that new housing is available, as well as a reluctance of blacks to leave familiar neighborhoods and venture into areas where they may feel unwelcome. But whatever the cause, the result is clear and lamentable.

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<sup>49</sup>U.S. COMM'N ON CIVIL RIGHTS, HOMEOWNERSHIP FOR LOWER INCOME FAMILIES (1971).

These findings on racial patterns in subsidized homes are analagous to those made in June, 1971, by the United States Commission on Civil Rights,<sup>50</sup> except that the Cincinnati Study found no new subdivisions that are predominantly black as reported there.<sup>51</sup>

3. *Age*.—New home purchasers, both in the control and the section 235 groups, fell into the twenty-one to thirty age bracket.<sup>52</sup> Combined with the data from the racial composition column of Table III, this data shows that most purchasers of new homes in Cincinnati were young, white married couples, whether assisted by the FHA program or not.

It may be doubted by some that Congress intended section 235 subsidies to benefit the young couple which is not entrenched in poverty but is moving up the economic ladder and would one day own a house even without any government aid. Although these couples were likely not its primary target, congressional intent generally was that stable families in the \$3,000-\$8,000 income level be assisted.<sup>53</sup> If such families happen to be college students or other young couples with temporarily low incomes, they should be equally eligible. In fact, for those who believe that one of the strengths of section 235 is the economic integration it promotes, such a mixed clientele within the program is a great advantage.

4. *Educational Level*.—Not surprisingly, the average educational level of the control group was higher than any of the section 235 groups except purchasers of new homes, who, as already shown, were like the average new control buyer, namely, white and young. The tenth grade was the median educational level of the head of household<sup>54</sup> for section 235 purchasers of existing housing, as it was for the section 104 and foreclosure groups.

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<sup>50</sup>*Id.*

<sup>51</sup>New black subdivisions were also found in Columbia, South Carolina. *Columbia Study*, *supra* note 41, at 111. The majority of purchasers in that study were black. *Id.* at 107.

<sup>52</sup>In the Columbia, South Carolina, study the average age was also "young," *i.e.*, 30. *Id.* at 107. Since three-fourths of the respondents in that study were in new housing, this data corresponds well with this study's new housing data.

<sup>53</sup>R. TAGGERT, *LOW-INCOME HOUSING: A CRITIQUE OF FEDERAL AID* 14 (1970).

<sup>54</sup>In this study, "head of household" was defined as the primary breadwinner of a family. Although this person was usually male, some females were "household heads."

These statistics, however, represent only an average. The variation was wide with twenty-five percent of the existing group graduating from high school with twenty percent having received no more than a sixth grade education. In the existing control group, however, the average achievement was a high school diploma. A high school diploma was even more likely to be found among the new control purchasers; although one such buyer had only completed the eighth grade, thirty-five had completed "some college." The median level of this group was "some college," with twenty-eight percent reporting that they were college graduates. Thus, the purchasers of existing housing appear to be comparatively handicapped by limited educational achievement, whereas those in new section 235 housing, while somewhat behind their respective controls, are substantially better off in terms of education than their counterparts in existing housing.

5. *Family Size*.—As is evident from Table III, existing section 235 housing has helped much larger families than has new section 235 housing or either set of control housing. The largest family in new section 235 housing had eight members, while in existing section 235 housing the average family had six members with twenty-three percent having nine or more members. Only fifteen percent of the new section 235 housing and five percent of the new control housing sheltered families with as many as six members. Thus, older housing appears to attract and best fill the needs of larger families who cannot be comfortably accommodated in the smaller new housing.<sup>55</sup> Use of older housing also permits subsidized buyers greater freedom of choice of location. For both of these reasons, it is important that it not be phased out of the program.<sup>56</sup>

6. *Occupational Status*.—The data shown in Table IV is consistent with other information that purchasers of new housing under section 235 are similar in many respects to purchasers of new control housing and differ significantly from all other purchasers of section 235 housing. If these purchasers are omitted, it is clear that section 235 has aided to an important extent those

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<sup>55</sup>Evidence strongly suggests that housing for the large, poor family is "one of the most desperate urban needs in the Country." P. MARTIN, *THE ILL-HOUSED* 1002 (1971).

<sup>56</sup>Betty Frieden relies on this factor in recommending that greater use of existing housing be allowed. B. Frieden, *Improving Federal Housing Subsidies* 17 (Working Paper #1 for The Joint Center for Urban Studies of M.I.T. and Harvard University, 1971) [hereinafter cited as B. Frieden].

lower occupational groups which might not otherwise have been able to obtain houses.

To ascertain the occupational status of the samples, the authors utilized a socio-economic status score based on a table employed by the United States Census Bureau.<sup>57</sup> This table ranks professions with a score from one to ninety-nine, based upon earnings and educational requirements. Physicians rank highest with a score of ninety-nine while domestic day workers have a score of seven, and construction workers are scored at sixteen. The authors assigned persons on welfare a status score of zero although it was not included in the Census Table.

Because a substantial number of families in the section 235 groups were on welfare—a constant twenty-five percent except in the new housing group in which there were no families on welfare—the authors calculated both the overall average status number and the average, excluding persons on welfare. Clearly the section 235 program has, to some extent, broken class barriers and permitted those of a lower socio-economic status to live close to those with more prestigious occupations.<sup>58</sup> A definite class distinction remains, however, between section 235 purchasers of new and existing housing.

*Table IV: Occupational Status*

<i>Section 235 purchasers</i>	<i>Average score</i>	<i>Average score excluding welfare</i>	<i>Percent on welfare</i>
New .....	59	59	0
Existing .....	28	38	25
§ 104's .....	33	44	25
Foreclosed .....	28	41	25

<sup>57</sup>U.S. CENSUS BUREAU, UNITED STATES CENSUS OF POPULATION: 1960: SUBJECT REPORTS: SOCIO-ECONOMIC STATUS, Appendix I at 264-67 (1967).

<sup>58</sup>See Krooth & Sprogens, *Housing Problems*, *supra* note 10, at 815, for the recommendation that even greater economic integration should be encouraged through affirmative action by the FHA. The authors suggest that up to twenty-six percent of appropriations for housing subsidies should be set aside for families in any income range and that their housing purchases in what are presently section 235 "communities" should be subsidized up to two percent of their interest rate. Such subsidy would encourage wealthier families to move into lower income areas and so would avoid creation of stigmatized and isolated lower-income developments. It would also be likely to forward racial integration. *Id.* at 816.

HUD also has suggested that a greater economic mixture should be promoted by prohibiting exclusive sales in new developments to section 235 buyers and perhaps by limiting their number to fifty percent in any given development. AUDIT REVIEW, *supra* note 23, at 35.

Control purchasers

New .....	72	72	0
Existing .....	55	55	0

7. *Stability*.—Although “stability” and “maturity” may not be measurable, the authors had hypothesized that the factors of transiency, length of time in present job, and prior evictions for nonpayment of rent or other misconduct on rental premises might be relevant to this inquiry. Instead the Cincinnati Study discovered the following:

(a) Section 235 purchasers are not noticeably more transient than control purchasers, when measured by duration of their housing residence immediately prior to the purchase of their present house.<sup>59</sup>

(b) Job tenure data reveals no trends within the various groups and this factor appears to be irrelevant in predicting success or failure among homebuyers.<sup>60</sup>

<sup>59</sup>Data collected is shown here:

*Length of Time in Prior Residence*

	<i>Percent living there more than six years</i>	<i>Percent living there less than three years</i>
<i>Section 235 purchasers</i>		
New .....	5	78
Existing .....	33	25
§ 104's .....	23	50
Foreclosed .....	13	68
<i>Control purchasers</i>		
New .....	..	78
Existing .....	20	58

This data is predictable if one realizes that younger families, those primarily in new housing, are the most likely to be improving themselves financially and so are the most likely to be mobile. In contrast, the least mobile, so-called “most stable” group was in existing housing. These are primarily the older families who would be less likely to be moving up the income ladder and more likely to have ties in one neighborhood. Also, because they are generally poorer, they are less likely to have the money to move often.

<sup>60</sup>This data is charted below:

*Job Tenure*

	<i>Percent on job five years or more</i>	<i>Percent on job two years or less</i>
<i>Section 235 purchasers</i>		
New .....	25	35
Existing .....	38	8
§ 104's .....	43	15
Foreclosed .....	22	12
<i>Control purchasers</i>		
New .....	35	23
Existing .....	50	18

(c) Neither the section 235 purchasers nor the control purchasers had been overtly unstable enough in their prior residential experiences to require eviction for late payments or other such misconduct.<sup>61</sup>

#### IV. ASSESSING THE ALLEGATIONS OF ABUSE

Having delineated the basic characteristics of the groups of section 235 purchasers, and having discovered that, except for buyers of new houses, the buyers tended to be those most intended to be benefitted by the legislation, one must turn to the heart of this inquiry, namely, the true extent of abuse under the section 235 program. The Cincinnati Study set out to answer this problem by focusing on three questions. (1) Were the houses purchased in Cincinnati under the program as inadequate as the reports given during the 1970 congressional hearings would indicate? (2) Even if they were inadequate, was this inadequacy the cause of higher foreclosure and repair rates among section 235 purchasers? (3) Finally, despite the hypothesized greater rate of failure among section 235 purchasers, did the social benefits obtained by the preponderance of buyers outweigh this higher rate of failure in the program?

##### A. *The Kinds of Homes Purchased*

###### 1. *Existing vs. New Homes*

As already indicated,<sup>62</sup> section 235 provides for the purchase of existing, rehabilitated, or new housing. In Cincinnati, however, there are no formal rehabilitation projects for single-family dwell-

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<sup>61</sup>Interviewees were asked if they had ever been requested to leave a previous residence. The great majority had not. Percentages of negative replies were: existing section 235, sixty-five percent; existing controls, seventy percent; new section 235, ninety-three percent; new controls, seventy-five percent; section 104's, sixty-eight percent; and foreclosures, seventy-one percent. Of those asked to move, most were not asked for fault-related reasons. Urban renewal or apartment rehabilitation had caused the eviction of thirteen percent of the existing section 235 and section 104 groups and ten percent of the foreclosed group, while only five percent of existing controls and only one person in new housing were forced to move for this reason. A few persons were "evicted" from houses which they had been renting and told that the landlord would sell them that house with the help of section 235 money. Certain other families were evicted from public housing because their income exceeded the income limits permissible in such housing. Eviction for nonpayment of rent was reported by only three persons in this study. Additionally, most interviewees had had no problems with their landlords other than the landlord's failure to make repairs.

<sup>62</sup>See note 43 *supra* & accompanying text.

ings, and therefore only existing and new housing projects were considered.

New housing generally presents administrative advantages to the FHA. It allows the FHA to work with developers with whom the insuring office is familiar through previous transactions. Generally, a number of nearly identical homes, varying only in floor plan, are built in a single area where inspections can be carried out on a continuing basis with minimal wasted travel time. For the buyer, in addition to the FHA "safeguards," there are county or city building inspections which tend to insure that the new building complies with the applicable codes. The most important advantage to the buyer, however, is the guarantee which the seller must give by the terms of the FHA financing. Under such a guarantee, most buyers of new homes would have only to call their sellers or secure a needed repair during the one-year warranty period. Additionally, all new equipment in the house is guaranteed, so that the buyer is protected by manufacturer warranties on such costly items as water heaters and furnaces. There are, however, pitfalls in this system of separate warranties by individual manufacturers. If the builder himself cannot be held responsible, it may be difficult for the buyer to find out who is. There is also the disturbing possibility that the responsible party has gone out of business, as occurred with one buyer in the control sample in whose home air conditioning had been installed without air vents. She had no recourse, and the system was useless.

All of the safeguards which help to insure that new houses will be reasonably free of problems are absent in existing housing. This deficiency could be partially remedied by requiring a prior inspection by a professional inspector or a city code inspection. This precaution is rarely taken voluntarily by buyers, whether or not the purchase is by means of section 235 assistance.

## *2. Size of Homes*

Not surprisingly, the survey indicated that existing homes in the price range available under the section 235 program and equivalent homes within the control group were larger and more spacious than any of the new housing. Again, not surprisingly in light of the finding that larger families could be found in the existing section 235 group, these houses generally had more bedrooms. Somewhat smaller houses were found in the existing control group. In new section 235 housing, the homes were more

uniform and even smaller.<sup>63</sup> But these figures do not reflect the great disparity in overall size between new and existing homes. Many of the older homes were truly spacious but no new homes could properly be described in this way.

3. *Price of House and Size of Payments*

The median price for all section 235 homes in the Cincinnati Study was between \$15,000 and \$15,999. In the new housing category it was \$20,675 and in existing housing it was \$14,950. As indicated by Table V both sets of controls were within \$1,000 of these figures, demonstrating that they were well chosen, suitable controls. The new control housing was of identical construction to the section 235 housing. The small difference in average price was a result of optional extras chosen by the control families who were not limited by statutory maximum costs.

The overwhelming majority of section 235 purchasers in all groups reported that they paid the statutory minimum of \$200 as a down payment.<sup>64</sup> When the controls are compared to this statistic, one of the outstanding benefits of section 235 becomes immediately apparent. Among the existing control purchasers twenty-eight percent reported a downpayment in excess of \$1,000, and another sixty percent reported down payments of more than \$500; in new control housing, more than sixty percent reported downpayments of more than \$1000. Clearly the federal program enables people who cannot accumulate large savings the means by which to buy a home of their own.

Table V: *Price and Size of Payments*

	Average price	Average monthly payment <sup>65</sup>	Average monthly payment before buying present house
Section 235 purchasers			
New .....	20,675	111	107
Existing .....	14,950	91	80

<sup>63</sup>Fifteen percent of the existing section 235 housing contained two bedrooms, thirty-three percent had three, thirty-three percent had four, and fifteen percent had five or more. Forty percent of the existing control housing had two bedrooms, thirty-eight percent had three, twenty percent had four, and none had more than four bedrooms. In the new section 235 housing category, eighty-eight percent of the homes had three bedrooms and twelve percent had four.

<sup>64</sup>In existing housing, twenty-five percent reported paying more than \$200. In section 104 housing, eighteen percent reported a larger down payment, and in foreclosures, nineteen percent reported paying more. In new section 235 housing, however, there were only three deviations from the uniform \$200 down payment.

<sup>65</sup>The Columbia, South Carolina, study found an average monthly payment of \$86. Since three-fourths of the sample were new homeowners, this

§ 104's .....	15,385	98	82
Foreclosed .....	14,793	82	79
<i>Control purchasers</i>			
New .....	21,425	176	119
Existing .....	15,873	137	83

A comparison of the amount which section 235 purchasers paid in rent for their previous residences with the amount of their current mortgage payments shows that the subsidy enables homeownership at only a slightly elevated cost. Interviewees were asked whether their present monthly payments imposed too great a burden on them. Twenty-two percent of existing section 235 purchasers said that they did, and twenty-eight percent of existing control purchasers agreed. Only five percent of the new section 235 purchasers felt pressured by the payments, however, while a similar eight percent of the new control purchasers felt such pressure. Of the section 104 buyers, eighteen percent said that the payments were too high, and thirty-nine percent of the foreclosed group agreed that their payments had been too high.

However, only fifteen percent of the existing section 235 owners had ever missed a monthly payment, as had eight percent of the existing controls. Remarkably, no new section 235 owner reported missing any payments, compared to five percent of the new control owners who reported that they had. Among the section 104 owners twenty-three percent had missed payments and sixty-four percent of the foreclosed group said that they had done so.

Reasons for the missed payments were not necessarily economic inability to pay but a feeling of helplessness, especially in the section 104 group, when purchasers found their houses falling apart. Often, they stated that they sought to bring pressure for repairs on the mortgage company by withholding money owed. Some in the foreclosed group reported making full payments on their houses until they deliberately decided to move out, again, because of the uninhabitable condition of the house. Reasons for missed payments in other groups were purely economic, such as layoff or illness.

#### 4. *Physical Problems with the Homes Purchased*

Purchasers were asked to describe all of the problems that they had had with the homes they purchased. The types of problems which were found to be most significant in this study should

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figure is lower than that reported here, but this would be expected in a Southern city where the cost of living generally should be less. *Columbia Study*, *supra* note 41, at 118.

provide some guideline for the FHA, for homeownership counselors, and ultimately for home buyers in determining in what aspects of a section 235 transaction particular caution should be exercised. Any single problem that would require the ordinary homeowner<sup>66</sup> to hire a repair person was recorded as a problem for the purposes of this study. Since the interviewers were not professional home consultants, no attempt was made to further classify the problems.

The patterns of problems found in existing section 235 and existing control houses, summarized in Table VI, were similar.<sup>67</sup> In both, plumbing was the most frequently encountered problem. It affected fifty-three percent of the existing section 235 houses and fifty-five percent of existing control houses. Interior problems such as cracked or crumbling walls, ceilings, stairs, and floors ranked second in the problem list. There was a significant number of other problems, such as rotten windows, fallen porches, heating systems, roofs, electrical systems, and yards. Yard problems included dead trees that required removal, sidewalks and driveways which were cracked and deteriorated, retaining walls needing repairs, and yard areas which needed to be cleared of junk. Vermin infestation was also a problem for some of the owners of existing homes.<sup>68</sup>

*Table VI: Defects in Existing Homes*

<i>Type of defect</i>	<i>Section 235 existing</i>	<i>Section 518's</i>	<i>Foreclosures</i>	<i>Existing controls</i>
Interior				
Plumbing .....	53%	85%	71%	55%
Walls, ceilings, etc. ...	53%	62%	67%	23%
Heating .....	45%	60%	61%	30%
Electrical .....	35%	74%	74%	30%
Exterior				
Windows, porches, etc. .	48%	58%	70%	23%
Yards .....	28%	42%	32%	18%
Vermin .....	20%	35%	61%	25%
Roof .....	40%	68%	68%	30%

<sup>66</sup>For the purposes of this study, an "ordinary homeowner" can be defined as one who has no special skills or training in any construction trade such as plumbing, roofing, or electrical work.

<sup>67</sup>For data on repairs needed on section 235 homes in Columbia, South Carolina, see *Columbia Study*, *supra* note 41, at 123.

<sup>68</sup>The most severe case of vermin infestation encountered was in one house near the Ohio River where not only were crawling insects visible but the owner stated that she saw snakes in her basement and did not know whether they were poisonous.

In new section 235 housing and new controls, the most frequently mentioned problems concerned the yard. Sixty-seven percent of new section 235 housing and fifty-three percent of new controls had problems with their yards. In contrast to the existing housing, these problems generally were relatively minor, such as getting grass and shrubs to grow, but more serious problems with topography were also included. Many houses were placed in such a way that back yards were virtually nonexistent, since the lot sloped off steeply into a ravine. Roof problems were mentioned by a few interviewees. Vermin infestation was not a problem in the new housing.

Ceiling-wall type problems were frequently mentioned by new homeowners. Generally these problems were inconsequential when compared to the serious problems found in existing housing, but a few serious problems were found. For example, one buyer found, when winter came, that his house had absolutely no insulation. Plumbing and heating problems were also not uncommon. Most notable were a group of houses erected by one builder, who had installed furnaces too small to adequately heat the homes in winter. Although the buyers were sure a larger furnace had been in the model home which they had seen, the model was no longer standing, and they were unable to prove their allegations.

While most of the problems mentioned were fixed by the builder following scheduled six- and twelve-month inspections made under the warranty, numerous interviewees felt frustrated and angry that their complaints had been handled so slowly. They were also angry about problems which recurred which the builder seemed unwilling or unable to fix permanently. Most notable among these complaints were those of dying shrubs which were replaced, by new ones which also later died. The problem seemed to stem from substandard rocky topsoil which had been laid originally.

Table VII: Defects in New Houses

Type of defect	Section 235 houses	New control houses
Exterior		
Yards .....	67%	53%
Roofs .....	18%	10%
Interior		
Plumbing .....	20%	28%
Heating .....	20%	23%
Electrical .....	5%	13%

The section 104 group by definition experienced problems with their homes, but foreclosures were found to have had problems

similar in type and quality to the section 104's.<sup>69</sup> To find out how well section 104 had done its job, inquiry was made of these purchasers to determine whether the requested repairs were done, and, if so, how satisfactorily. In the group of forty surveyed, the FHA corrected an average of 3.4 problems per house, at a cost, according to FHA records, of \$1,800 per house. However, despite this large outlay, section 104 was not without its problems. Many of the repairs which apparently should have been made were not in fact corrected. Only sixty-eight percent of the plumbing problems in the section 104 group received corrective governmental assistance. Likewise, only seventy-two percent of the electrical problems, seventy-four percent of roof problems, seventy percent of exterior problems, fifty-six percent of ceiling-wall type problems, seventy-one percent of heating problems, forty-three percent of vermin problems, and twenty-four percent of yard problems were, according to the respondents, corrected by means of section 104 aid.<sup>70</sup>

Since members of the foreclosed group were, by definition, no longer in their houses, systematic observations of them were not possible. However, visits to a few of these homes revealed that many were merely shacks. Others had been razed and still others were in areas where the entire neighborhood had been virtually abandoned. There is no doubt that many of the homes lost by foreclosure were among the worst in the Cincinnati area. It must be added, however, to complete the picture, that other foreclosed houses appeared neat and maintained from the outside and that these owners had been far better off in them than they were when interviewed in new surroundings, which most often were rat-infested public housing.

A minority of houses in any category were completely free from problems requiring major or minor repairs during the home-owning experience of the interviewee. The total average number

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<sup>69</sup>This data can be found in Table VI.

<sup>70</sup>12 U.S.C. § 1735b(b) (1970). One other problem which frustrated the purpose of section 104 was the failure of the FHA to notify home buyers of their rights under the section. Only twenty-eight percent of existing purchasers could remember receiving notice that FHA repairs were available. Of the group which received section 104 repairs, thirty-three percent reported that they did not receive a notice that the FHA would make repairs, but had managed to obtain such repairs because they had initiated persistent complaints to the FHA.

A copy of the letter sent to homeowners notifying them of their rights to have section 104 repairs performed can be found in EDSON & LANE, *supra* note 4, at 5:126.

of problems per house gives a more accurate indication of the condition of the house and the frustrations of homeownership. As summarized in Table VIII, those in the foreclosed group had the most difficulty, with an average of seven problems per house, while the new control houses experienced the fewest problems with approximately three each.

Table VIII: Number of Problems Per House

Section 235 purchasers	Average number of problems	Percent of homes with no problem
New .....	3.5	15
Existing .....	4.6	18
§ 104's .....	6.3	0 (by definition)
Foreclosed .....	7.0	6
Control purchasers		
New .....	3.2	25
Existing .....	3.8	30

While the section 235 purchasers had more problems in every case than their control counterparts, this data demonstrates the misleading character of one of the major criticisms of the program voiced during the 1970 congressional hearings, namely, that purchasers were bilked by buying inferior houses from unscrupulous realtors. Many of the houses sold to section 235 purchasers were, indeed, in need of repair. But these problems were not at all the exclusive province of section 235 homes. In each category of repair, both groups experienced significant hardship. The greatest difference between the two groups was in the "ceiling-wall" category which is likely to be most easily cosmetized. The fault appears to lie not in the program, but in the kinds of homes which are available to any purchaser in this price range. If the Cincinnati Study shows nothing more than this, it is significant, for it focuses the spotlight on the real source of the problem, namely, insufficient funds to purchase adequate housing and lack of sufficient policing of FHA inspections to screen out the bad houses. The data which shows that control groups had numbers of problems similar to the section 235 groups also disproves the thesis of some that people who buy section 235 houses will not take care of them and hence are the real "villains".<sup>71</sup>

5. Reactions of Purchasers

While it is possible to label specific defects as "problems," the critical question is whether the purchasers saw these problems

<sup>71</sup>1970 HEARINGS, *supra* note 22, at 4; Comment, *Exploiting the Home-buying Poor: A Case Study of Abuse of the National Housing Act*, 17 ST. LOUIS U.L.J. 525, 530, 540 (1973).

as significant. In five of the six groups interviewed a majority of purchasers expressed satisfaction with the homes they had purchased, while only in the foreclosed group were a majority dissatisfied. Specifically, seventy-three percent of existing section 235 owners were satisfied, and eighty percent of existing control owners also were satisfied. In both new section 235 and new control housing, eighty-five percent were satisfied. But in houses requiring section 104 repairs the number dropped to fifty-three percent, and of the foreclosed owners, a mere twenty-six percent expressed satisfaction with the homes they had lost.

The most prevalent cause of dissatisfaction was the high number of repairs required. Dissatisfaction with "neighborhood" was mentioned in only five instances in all of the groups combined. Another factor which frequently influenced negative responses to this question was costly utility bills, especially in the larger, more poorly insulated older houses.<sup>72</sup>

Answers to the question "If you had it to do over again, would you buy the same house?" revealed significant dissatisfaction in all groups. Predictably, the majority of section 104 buyers, sixty-five percent, and foreclosures, sixty-one percent, answered in the negative. In thirty-six percent of existing section 235 housing and forty-three percent of existing control housing, the buyers would not buy the same house again. In new section 235 housing, twenty-three percent replied that they would not do so, while in new controls thirty-six percent replied in the negative. It is noteworthy that the control groups in both instances showed greater dissatisfaction than did the section 235 purchasers. Hence, the seemingly high percentages are no indication of weakness in the section 235 program.

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<sup>72</sup>Utility bills can indeed add substantial unexpected amounts to the price of home upkeep. Purchasers should be warned about this and an additional subsidy should be given when they are especially burdensome. This suggestion is made notwithstanding the fact that the amount of subsidy was originally set after considering utility expenses. The portion of income which a buyer must contribute toward house payments was set at twenty percent instead of twenty-five percent for the reason that utility bills can be expensive. *Hearings on H.R. 15624, H.R. 15625 and Related Bills Before the Subcomm. of the House Comm. on Banking and Currency, 90th Cong., 2d Sess., pt. 1, at 77 (1968).*

Utility bills have also been credited with causing discrimination against those living in colder parts of the nation, in that the subsidy formula is not adjusted to account for the fact that persons living in warmer climates pay much less in total housing costs, since their utility bills are much lower. See B. Frieden, *supra* note 56, at 9.

Home buyers reacted to the need for repairs in diverse ways. In existing section 235 housing, while only seven persons responded that their houses were free from problems throughout their home-owning experience, twenty-nine had spent nothing on repairs. Those who made repairs spent an average of \$418 during the period of ownership. Additionally, six of the purchasers of existing section 235 houses reported that they had spent some money on home improvements, averaging \$1,790 per house. In existing control housing, twelve purchasers reported their houses free of problems, while twenty-four spent no money on repairs. The average repair cost in this group was \$500. Fourteen families in existing control housing, however, contrasted with six in the existing section 235 housing, had made home improvements which averaged \$1,130.

In the section 104 group, although no house was without problems, eighteen interviewees reported spending nothing of their own on repairs, while the average spent was \$198. Finally, in the foreclosed group, only two reported having no problems, but ten spent nothing on repairs, and the average amount spent was \$248. Clearly, a number of persons in each group of existing housing made substantial efforts toward the maintenance of their houses, just as many did or could make no effort at all.

The new houses were all under warranty from the builder throughout most of the interviewees' ownership, and these purchasers had, for the most part, not yet had to face this type of maintenance cost. Thus, in eighty-eight percent of new section 235 housing and ninety percent of new control housing, purchasers had so far spent nothing on repairs. Substantial amounts had been invested, however, in home improvements in each of the new housing groups. Forty-five percent of those in new section 235 houses had made improvements at an average cost of \$275. In new control housing, fifty-three percent had made substantial improvements averaging \$520.

#### *B. The Sales Transaction*

Among the charges leveled at section 235 during the 1970 hearings were high pricing and unethical conduct allegedly engaged in by many of the persons involved in the sale transaction. Implicit in these charges was the suggestion that the purchaser of a section 235 house was especially vulnerable to harmful influences or was ignorant of important aspects of home buying, including the law regarding the sale and the need for professional assistance such as that of an attorney and house inspector. The Cincinnati Study sought to ascertain the extent of the naïvete among the

purchasers. The findings, detailed below, lend little, if any, support to the view that section 235 purchasers are particularly ignorant of the law. Home buyers in all six groups lacked such knowledge and failed to avail themselves of various types of protection such as might be afforded by an attorney's or house inspector's services.

### 1. *Reasons for Desiring to Buy a House*

An important consideration in determining whether section 235 purchasers were less adequate home buyers must be their reasons for the purchase. As Table IX indicates, a substantial number of these purchasers had been or were about to be forced to move. Whatever this may say about their economic or residential stability,<sup>73</sup> such an impetus to buying a house must work to the disadvantage of any purchaser who knows that within days, or weeks at most, a new home must be found.

*Table IX: Most Usual Reasons for Purchasing a House*

<i>Section 235 purchasers</i>	<i>Percent forced to move</i>	<i>Percent desiring a house</i>	<i>Percent needing space</i>
New .....	3	48	23
Existing .....	33	20	18
§ 104's .....	28	28	20
Foreclosed .....	19	39	16
<i>Control purchasers</i>			
Existing .....	25	40	10
New .....	5	48	18

In any event, there is no clear distinction between 235 purchasers, as a group, and control purchasers on the forced-to-move criterion. However, it may be that section 235 purchasers who were forced to move just prior to their purchases, experienced a greater degree of desperation than control purchasers. The very fact that they qualified for section 235 assistance means that they probably had no money to utilize while they took time to search for decent accommodations. In fact, several interviewees specifically mentioned that they were caught in this situation and so were easily pressured by real estate agents into buying the first house which they saw. Some of the worst houses were bought under these circumstances.

It is also noteworthy that a substantial number of persons moved from prior residences simply because they preferred living in a house of their own.<sup>74</sup> Such data lends support to the thesis

<sup>73</sup>See note 61 *supra* & accompanying text.

<sup>74</sup>Other researchers have collected similar convincing data on this point. For a discussion of such studies, see Sengstock & Sengstock, *Homeownership:*

underlying the section 235 program that homeownership is a widespread desire among lower-income persons as well as the rich.

2. The Search for Housing

Buying a house is no easy task. There are many factors in selecting a house, whether new or old, and many reasons for finally settling upon the one purchased. A second inquiry, then, was to determine whether there was a difference between section 235 purchasers and control purchasers in the extent of exploration or the final reason for selecting the residence purchased. It was hypothesized that the more deliberate the buyer was in selecting a house, the better house he would obtain.

Table X indicates that this may be so. Although there were more significant differences between purchasers of new homes, whether section 235 or control, on the one hand, and purchasers of existing homes, whether section 235 or control, on the other, the data demonstrates that here, in contrast to other areas, there seemed to be significant differences between the existing section 235 purchasers and the existing control purchasers. Fifty percent more of existing section 235 buyers looked at the final house only once before purchase than did their control counterparts. More startling is the figure on bargaining. Fifty percent of the existing control purchasers bargained significantly over price, while a very small percentage of all three groups of the nonnew section 235 housing did so.<sup>75</sup> Also, the control purchasers tended to look at more houses than did the section 235 purchasers of similar houses.

Table X: Home Investigation

Section 235 purchasers	Percent who saw only house they bought	Average number of homes seen	Percent who did not see whole house	Number of times house seen before contract signed			Percent who bargained over price
				once (%)	twice (%)	more (%)	
New . . . . .	10	5	13	30	18	52	N.A.
Existing . . . . .	28	5 or less	0	32	33	35	13
§ 104's . . . . .	35	5 or less	13	40	18	42	20
Foreclosed . . . . .	35	5 or less	6	38	16	46	3

A Goal for All Americans, 46 J. URBAN L. 313, 318 (1969). The authors also made their own study. *Id.* at 320.

<sup>75</sup>New housing prices were found to be inflexible shortly after the study was begun, and thus the bargaining question was soon dropped.

*Control  
purchasers*

New . . . . .	5	more than 10	13	23	18	59	N.A. <sup>76</sup>
Existing ..	13	more than 5	5	23	35	42	50

The contrast which these figures reveal between section 235 purchasers and their control counterparts can best be explained by two factors. (1) The desperation factor, as discussed above,<sup>77</sup> which probably causes many low-income persons to be unable to make a carefully calculated decision. Any house will relieve the pressure of the momentary homelessness, so a quick and impulsive decision is made to buy. (2) The syndrome of the poverty-stricken, alluded to by sociologists,<sup>78</sup> which consists of feelings of helplessness, insecurity, and alienation, may also have some impact here. The authors sensed such feelings on the part of many interviewees signified by their resigned acceptance of their plight when faced with hopelessly expensive utility bills, repair bills, and the imminent loss of their homes. Indeed, the bureaucracy which surrounds a home purchase is complex, consisting of a real estate agent, a lending bank, and the FHA. When trouble arises, city building inspectors, social workers, and housing specialists may become involved. Thus, the poor may have difficulty communicating their problems to the proper agency and are constantly awed by the complexity of both the initial sale and the later repair channels. In the purchase transaction, however, the poverty syndrome may have led many poor buyers to feel that they could not insist on seeing more than one house, or at most, a few houses. To ask for such a service would be "ungrateful" or "more than they deserved." Unfortunately, as the figures show, those purchasers who looked at fewer houses, for whatever reasons, were more likely to experience greater problems, signified by foreclosures and section 104 repairs.

Although not included in Table X, the data showed no significant difference among the groups based upon the time spent in weighing the decision to buy. In all groups, one-fourth to one-third of the purchasers decided to buy their homes the same day they first saw them, and a majority of all groups except the foreclosures made the decision to buy within one week of seeing the houses. In conjunction with the finding that existing 235 purchasers tended to look at fewer houses than other home buyers, these figures indicate that one cause of later dissatisfaction may have

<sup>76</sup>It appeared that prices on new homes were not open to negotiation.

<sup>77</sup>See note 73 *supra* & accompanying text.

<sup>78</sup>See, e.g., HEW, *LOW INCOME LIFE STYLES* 2 (1971).

been the buyers' carelessness in selecting houses. Even if hurried decisions were unavoidable for those who were forced to leave prior homes and there may have been only a limited selection of housing available within the buyers' price range, a basic education in comparison shopping could have greatly benefited purchasers with no homeownership experience.

A surprising number of persons indicated that they had not even had the temerity to look at the entire house they bought before they signed the sales contract. One buyer related that she was not shown the second floor of the house because children were asleep when she came to look at it. She later discovered major problems with a leaky roof. Another buyer had lived in her house for several months when she accidentally noticed a stairway leading to an undiscovered third floor. Both stories illustrate the carelessness with which section 235 homes are often shown.

Interviewees were also asked why they chose the house which they finally bought. Space for children was the most frequent response from existing section 235 purchasers, but not nearly so important for existing control or new housing purchasers. Neighborhood was the second most frequently mentioned consideration for existing section 235 purchasers, while it was the most important reason among existing control purchasers. Neighborhood, however, was not important to new home owners. Price and floor plan, more than other factors, seemed to influence new home buyers, both section 235 and control purchasers. Generally, the economic situation of the purchasers influenced what they looked for in a home. Groups having greater economic freedom, as did the existing control, new section 235 and new control purchasers, were more concerned with amenities and prices, whereas those purchasers in more difficult economic situations were most concerned with space and neighborhood.

Table XI: Prime Reasons for Selecting the House Bought<sup>79</sup>

	Only one they saw	Neighborhood	Space for children	Price	Floor plan	Other
Section 235 purchasers						
New .....	2%	5%	20%	25%	22%	27%
Existing .....	13%	18%	40%	5%	8%	30%
§ 104's .....	18%	20%	23%	8%	15%	35%
Foreclosed .....	3%	23%	10%	19%	5%	43%
Control purchasers						
New .....	3%	8%	18%	30%	33%	14%
Existing .....	3%	33%	10%	25%	23%	10%

<sup>79</sup>In the Columbia, South Carolina, study "quality or early availability date" was the most frequent response to a comparable question. "Neighborhood" and "location" were next. See *Columbia Study*, *supra* note 41, at 130.

Other data, summarized in Table XII, demonstrates that all of the purchasers in the Cincinnati Study were unsophisticated about the use of professional home inspection services, although as suggested below, this may be due to a misconception of the FHA's role in the transaction.<sup>80</sup>

Table XII: Professional Assistance

	Percent who used their own professional inspectors	Percent who hired their own attorneys
<i>Section 235 purchasers</i>		
New .....	N.A.	5
Existing .....	13	8
§ 104's .....	8	2
Foreclosed .....	6	2
<i>Control purchasers</i>		
New .....	N.A.	8
Existing .....	10	10

Few in any of the groups used the services of an attorney in their purchases.<sup>81</sup> Attorneys could have provided guidance by requiring greater care in the prepurchase inspections and might, by their presence alone, have elicited greater cooperation from the sellers. Need for attorney services can be dramatically demonstrated by the fact that a significant number of buyers relied on the promises of sellers or real estate agent to make repairs, without demanding that these promises be placed in the contracts of sale.<sup>82</sup> At least some standard form sales contracts used by new housing sellers provide additional evidence that an attorney's services are vital. These contracts provided virtually no protection for buyers, who usually bought unconstructed houses on the promise that their houses

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<sup>80</sup>See note 86 *infra* & accompanying text.

<sup>81</sup>James Condit, who was director of Cincinnati's Lawyers for Housing before it went out of business for lack of funds, has deplored the fact that so few Cincinnatians purchasing section 235 homes had private attorneys. Condit, *Cincinnati Director's Report*, 4 URBAN LAW. 326, 329 (1972) [hereinafter cited as J. Condit]. He cites as reasons for this situation that (1) many poor families view even a slight additional expense for a lawyer as too much, and (2) a misunderstanding by low-income purchasers that someone else, such as lending institutions and the FHA, is looking out after their interests by searching titles and inspecting the houses. They are thus led into a false sense of security. Condit believes that abuses in the section 235 program would "never have developed to the proportions they did if low-income families had been represented with the benefits of even minimal scrutiny by an attorney." *Id.* at 329. He recommends that HUD allow attorney fees to be included in closing costs.

<sup>82</sup>When questioned about their satisfaction with the services of real estate agents, the most significant recurrent complaint concerned the unfulfilled promises of sellers and agents to make repairs.

would conform to the models which they saw. Yet there was no description of the model in the contract, and often buyers believed they were buying a fully equipped home as earlier viewed by them, when many of the features were options which could be obtained only at additional cost. One section 235 purchaser believed he was buying a finished family room with his house and did not discover that he had barren basement walls until he moved in. Still another group of buyers found out too late that the furnaces they had bought were too small to properly heat their houses. Although they were sure that the model which they had seen had contained a larger furnace, the models had since been torn down, and their sales contract provided them with no proof of their allegations.

Even if one were to think that any reasonable purchaser would understand that finished family rooms cost extra money, it is not nearly so evident that anyone would stop to question whether a back door was optional at extra cost. Yet this was the situation in several of the developments in the Cincinnati Study. Many families in new housing angrily denounced the fact that this was not pointed out to them at the time they purchased the house. They felt that it was not only inconvenient but dangerous not to have a back door. Presumably the back door option was not pointed out to section 235 purchasers since this "extra" would have raised the cost above the statutory limit, and so it remained in fact an option closed to them. Nevertheless, they should have understood what they were buying.

Additionally, the standard form contract which the authors observed being used by new housing developers provides that the seller may substitute comparable materials if he is unable to procure those seen in the model. This vague phrase seems open to abuse, although one seller assured the authors that such substitutions are in fact submitted to the buyer for approval. But what if such approval is not sought or obtained? The buyer has no written protection. Surely an attorney would warn a client of the dangers of signing such a vague and unsatisfactory document.

Finally this study examined the understanding of section 235 purchasers of the legal aspects of the transaction. While virtually no section 235 purchaser understood that mortgage payments might be increased by any one of three occurrences,<sup>83</sup> a large percentage were aware that income changes would affect payments.

In light of the purchasers' lack of awareness on many issues, the authors were surprised to find that high percentages of buyers

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<sup>83</sup>These are an increase in property taxes, an increase in insurance costs, or a change in family size. See 12 U.S.C. § 1715z(c) (1) (1970).

in all six groups knew that they could deduct the interest paid on their mortgages on their federal income tax returns. Sixty percent of those in existing section 235 housing knew that they could, compared with eight-eight percent of those in existing control housing. In new section 235 housing, seventy-five percent of the purchasers knew that they could deduct interest, as did eight-five percent of new control purchasers. In section 104 housing and foreclosures, a lesser number, but still substantial, forty-five percent and thirty-nine percent respectively, knew that they could deduct the interest. The Internal Revenue Service has ruled that recipients of section 235 subsidies need not report the subsidy as income but that they can nevertheless deduct the full interest payment from their taxes.<sup>84</sup>

Most important in the section 235 buyer's understanding of the transaction is an awareness of the FHA's role.<sup>85</sup> This is crucially important, for unless it is properly understood, the buyer will place undue reliance on the FHA inspection. While the FHA has never guaranteed anything to the home buyer, more than fifty percent of each section 235 group relied on the FHA inspection to find serious defects in the house.<sup>86</sup> Although the FHA will disclose to the buyer defects found by appraisers which must be corrected before the transaction will be approved, the FHA inspection is not primarily intended to protect the buyer, but rather to assure that the value of the house is equal to the amount of the mortgage insured by the FHA.

## V. CONCLUSION

Despite the adverse publicity which the section 235 program has received, the Cincinnati Study found much to recommend its continuation. The high degree of satisfaction of the homeowners themselves supports this assessment.<sup>87</sup> Owners of both new and existing section 235 homes expressed satisfaction

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<sup>84</sup>The service has taken this position in a letter ruling made public. 2 P-H 1974 FED. TAXES ¶ 13,040(10).

<sup>85</sup>This problem is also noted in *AUDIT REVIEW*, *supra* note 23, at 55.

<sup>86</sup>Seventy-seven percent in existing section 235 housing relied on the FHA; in existing controls, sixty-eight percent were purchased under conventional FHA-insured mortgages and sixty-four percent of these relied on the FHA inspection. In new section 235 housing, sixty-three percent relied on the FHA, as did seventy-three percent of the twenty-two new controls purchased under conventional FHA mortgages. Among section 104 purchasers, seventy-three percent relied on the FHA, while among foreclosed purchasers, sixty-eight percent relied. Additionally, nearly fifty percent of each group thought that the FHA guaranteed the quality of the house to some extent.

<sup>87</sup>See p. 777 *supra*.

nearly equal to that of similarly situated control homeowners. Additionally, most appeared to be living in better circumstances than they were before their home purchases. While most had previously rented apartments or occupied public housing, they were at the time of this study situated in their own homes which more adequately fulfilled their needs at little increased cost. Generally, these families had more room, a yard, greater privacy, and a better neighborhood. For many large families the section 235 program provided the *only* opportunity for comfortable living. Furthermore, these authors found that, contrary to the impression created by the storm of adverse publicity, both new and existing section 235 homes tended to be only slightly more problem-plagued than those in the control groups. Finally, in contrast to rent subsidy or public housing provisions, the section 235 program allowed families complete freedom in choosing housing locations, limited only by their incomes. Although new section 235 housing tended to be clustered in suburbs chosen by developers, the older housing was scattered throughout Hamilton County.

Although congressional intent was originally to phase out subsidies for existing housing, these authors conclude that existing housing is a valuable and an important part of the program. Since only the more moderate income participants within the group qualifying for section 235 aid can afford the new housing, elimination of the existing housing subsidies would screen out many whom the program was meant to serve and those in greatest need of its benefits.<sup>88</sup> More compelling is the fact that in cities where the cost of living is greater than in Cincinnati, elimination of existing housing would effectively terminate the entire program. In some northeastern cities new housing cannot be built for prices within the statutory limits because of high land values and construction costs. Finally, if only new housing were subsidized, the purchasers would probably tend to be young, white married couples. The large, often black ghetto family, for whom the income floor for federally subsidized housing was lowered by amendments prior to section 235's original enactment,<sup>89</sup> would remain trapped in rental housing.

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<sup>88</sup>Arguing that the emphasis on new construction is to a great extent in open conflict with the benefits of low-income homeownership, V. Bach agrees with this conclusion. V. Bach, *Subsidizing Homeownership Through the 235 Program: The Wrong Instrument for the Right Purpose* 5 (Working Paper #2 of the Joint Center for Urban Studies of M.I.T. and Harvard University, 1971) [hereinafter cited as V. Bach].

<sup>89</sup>Act of Sept. 23, 1959, Pub. L. No. 86-372 § 503(a), 73 Stat. 680; Act of July 12, 1957, Pub. L. No. 85-104 § 401(a), 71 Stat. 301. Both amend-

In addition to the poor physical condition of many huoses, one criterion of failure which opponents of the program cite is a high foreclosure rate. The Cincinnati Study revealed a foreclosure rate among section 235 buyers of approximately five percent, a rate somewhat higher than that of their control counterpart. However, it is not clear that this elevated foreclosure rate justifies labeling the program a failure. First, the benefits of the program seem to outweigh the slightly higher risk assumed when dealing with low-income buyers. Such risk must be considered as inherent and "acceptable," even though it is slightly higher than normal. Second, it is possible that when a payment is missed, low-income purchasers are treated more harshly by mortgagees than are middle-income buyers,<sup>90</sup> so the comparison of foreclosure rates is not a valid measure of the success of the program. And third, if the foreclosure rate appears threatening, corrective measures would not be difficult to establish.<sup>91</sup>

However, the Cincinnati Study found that most of the adverse publicity directed toward the section 235 program is not without foundation. Many of the existing homes were dilapidated and a few were uninhabitable. The FHA should have refused to insure mortgages on them and warned buyers to stay clear of them. The FHA appraisal was often inadequate to protect the buyers' or even the government's interest. Houses were insured that should not have passed the most rudimentary inspection, and many buyers did not have the necessary skills or experience to recognize defects in them. Even if they possessed these skills, many low-income buyers were desperate for housing and eager to buy the first house shown to them.

In addition to the problems which should have been obvious at the time of sale, many purchasers were without the necessary financial resources, or the necessary understanding of the need for repairs and upkeep. The data collected clearly shows that these purchasers did not make repairs as they were needed. Although financial difficulties were not widespread among section 235 purchasers generally, a significant number of foreclosures were occasioned by inevitable or unforeseeable crises, such as strikes and illnesses of short duration. However, this type of temporary

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ments have since been superceded. See 42 U.S.C. § 1402(1) (1970), as amended, 42 U.S.C. § 1402(1) (Supp. I, 1971).

<sup>90</sup>See note 97 *infra*.

<sup>91</sup>See *Forebearance Agreements* p. 815 *infra*.

problem is not difficult to remedy through corrective legislation.<sup>92</sup> Indeed the lack of provisions to cover these types of emergencies constitutes a glaring omission in the original act, particularly considering that the purpose of section 235 is to aid low-income purchasers who are the very persons most subject to financial collapse during temporary crises.

Despite the problems evident in the section 235 program, it seems undebatable that not only is homeownership traditionally a favored form of housing, but that it may be so with good reason. Offering more space and privacy, a house constitutes a very different type of physical accommodation than does a rented apartment. Indeed for the large family, there may be few, if any, viable alternatives. It would be a gross misjudgment by Congress to fail to recognize the benefits which the section 235 program offers.<sup>93</sup> Although reforms are needed, the Cincinnati Study demonstrates that at least in one geographic area the section 235 program is a highly beneficial and reasonably successful one.

#### VI. RECOMMENDATIONS FOR REMEDIAL LEGISLATION

The section 235 program should not be abandoned since its benefits appear to be great and its problems controllable. Recommendations for remedial legislation follow. Naturally, not all need be adopted, but adoption of at least some of them should be forthcoming to improve the program's success.

1. *Existing Housing*.—Funding for existing housing should be continued and should be increased. Existing housing meets the needs of large families and poorer families, neither of which are adequately served by other government-sponsored housing programs or by new section 235 housing. Such existing housing, if adequately inspected and repaired prior to sale under section 235, may also slow the decay of inner cities.

2. *Price Ceilings*.—Limitations on prices of houses that can be purchased under the program should be substantially raised to reflect increasing construction costs. Statutory limits should be flexible to allow for inflation and for varying construction costs around the country.<sup>94</sup> For example, families should not have to

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<sup>92</sup>*Id.*

<sup>93</sup>It is beyond the scope of this Article to compare the advantages of direct subsidies, as recently proposed by the President, note 34 *supra*, with the advantages of section 235.

<sup>94</sup>This suggestion has been made by other authors. See, e.g., Krooth & Sprogens, *The Interests Assistance Programs—A Successful Approach to Housing Problems*, 39 GEO. WASH. L. REV. 789, 813-14 (1971).

purchase houses without back doors because the slight additional cost would put them over the legislative cost limit. Such arbitrary restrictions tend to defeat, rather than promote, the goal of "a decent home for every American."

3. *Counselling.*—Home ownership counselling should be provided by the FHA to educate buyers concerning the buying process and normal home maintenance expenses.<sup>95</sup> As an adjunct to this counselling, the FHA should draw up a pamphlet explaining the basics of the real estate transaction, such as possible real estate tax increases, home upkeep, and the role which the FHA plays. Finally, the mortgagor should be informed in writing concerning the repairs which the FHA has required on the purchaser's house prior to its approval of insurance on that house. Such a requirement would put the homeowner more completely in control of repair problems which may arise later and would automatically create a check on the repairing contractor, since no one but the homeowner will be in a position to report such problems as they arise.

The counselling program would either be paid for completely by the federal government or charged to the buyer and prorated over his mortgage term. If as little as twenty-five cents were added to each payment over a thirty-year period, discounting interest, one purchaser would be supporting the counselling service to the extent of ninety dollars.

4. *Racial Integration.*—The FHA should act affirmatively to further racial integration in new housing sold under section 235 by means of an advertising campaign. This campaign could

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<sup>95</sup>Potential counselling services are already provided for. 12 U.S.C. § 1701y (1970). This provision creates the National Homeownership Foundation to carry out programs which would encourage public and private organizations to provide increased housing opportunities for low-income families, including programs of counselling. *Id.* §§ 1701y(a)(1)(B), (c)(1)(G). However, little if any counselling has flowed from this provision, at least in Cincinnati. The only counselling available in Cincinnati, on a very limited basis, is provided by the Better Housing League of Greater Cincinnati, 2400 Reading Road, Cincinnati, Ohio.

Section 237 of the 1968 Act also provides for the counselling of low-income families with poor credit histories in order to qualify them for section 235 purchases. *Id.* § 1715z(2). Unfortunately, this program has not been funded in most areas of the country, including Hamilton County, Ohio.

Counselling is recommended in virtually every report written on section 235. See, e.g., Note, *Abuses in the Low Income Homeownership Programs—The Need for a Consumer Protection Response by the FHA*, 45 TEMPLE L.Q. 461, 478 (1972); V. Bach, *supra* note 88, at 15; AUDIT REVIEW, *supra* note 23, at 56.

sponsor advertisements in black publications and could feature pictures of blacks living in new housing communities.

5. *Attorneys.*—Attorneys should be required to represent the buyer in all section 235 purchase transactions. A reasonable fee could be prorated over the term of the mortgage and would add only a minimal amount to each mortgage payment. Based on the customary attorney's fee for home purchase transactions in some sections of the country, one percent of the purchase price of the house, purchase of a \$20,000 house would incur a \$200 legal fee. If this were paid initially by the FHA and the buyer allowed to repay it over the term of his thirty-year mortgage, discounting interest, fifty-five cents would be added to each payment. For a less expensive house, the amount would be less. This additional cost is well justified since it will help to assure better inspections and more equitable sales contracts,<sup>96</sup> as well as better understanding on the part of the buyer.

6. *Forebearance Agreements.*—Mortgage contracts should contain an agreement by the mortgagee to forebear from foreclosing on the mortgaged house and to extend the mortgage term in the event payments are missed due to a temporary emergency, which could be statutorily defined and limited. Such a forbearance agreement would eliminate the possibility that a buyer would lose a home because of a temporary and unavoidable emergency, such as a layoff or strike.<sup>97</sup>

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<sup>96</sup>HUD reports that the problem of the vague sales contract is widespread and suggests that the FHA could provide additional protection for the buyer by drawing up a sales contract to be used in all section 235 transactions. AUDIT REVIEW, *supra* note 23, at 53-57.

<sup>97</sup>It has been recommended that forbearance be readily available to the low-income purchaser in trouble, consistent with the intent that in the case of low-income families foreclosure be only a last resort. See J. Condit, *supra* note 81, at 330. Condit believes that the low-income family is held to a higher standard of performance than more affluent families who would not lose their houses in the event they were beset by a temporary economic emergency. Usually, when the low-income family finds itself in trouble, all the money due is demanded from it each month, along with late charges, and partial payments will not be accepted. Naturally, beginning in the second month, such family finds it impossible to catch up, and foreclosure becomes imminent.

In reality, as Condit reports, FHA regulations allow mortgagees to forebear up to eighteen months without notifying the FHA. *Id.* at 331. In addition, there are several forbearance options as alternatives to foreclosure, including acceptance of partial payments or allowing the FHA to take over the mortgage and pay it off while the family is disabled. However, these alternatives are ignored by most mortgagees. In fact, one study reports that refusal to forebear is used by mortgagees for the purpose of forcing fore-

7. *Unexpected Repairs—Savings Provisions.*—There are several possible ways to help the homeowner handle unforeseen and necessary repairs so that they do not create bills impossible to meet. An escrow account could be set up into which the buyer would pay a certain minimal amount each month, perhaps two dollars, along with his mortgage payment. This money would be accumulated and, along with the interest it earns, would be payable to the buyer for necessary home repairs. Such a provision could probably only accumulate funds sufficient for minor problems, since a buyer could not reasonably be expected to pay much additional each month. Some may argue that even two dollars a month would be excessively burdensome. In the alternative, or in addition, the seller could be required to place some amount in an escrow account for repairs needed during the first year of ownership for defects existing at the time of sale. Still another alternative to protect the home buyer against excessive expenses emanating from defects in the house would be to require the mortgagee to give a limited guarantee on its fitness.<sup>98</sup>

8. *The FHA's Role.*—A basic reappraisal of the FHA's role in the section 235 program is necessary. That agency must view itself in part as a social welfare agency and broaden its restricted role of mortgage insurer.<sup>99</sup> In such a role, it would assume more responsibility for the condition of houses sold through the section 235 program. Consonant with this role, it could also, for example, run counselling programs as suggested above.<sup>100</sup>

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closure and that this occurs frequently among disadvantaged purchasers. Comment, *Exploiting the Home-buying Poor: A Case Study of Abuse of the National Housing Act*, 17 ST. LOUIS U.L.J. 525, 557-58 (1973).

<sup>98</sup>See Note, *Abuses in the Low Income Homeownership Programs—The Need for a Consumer Protection Response by the FHA*, 45 TEMPLE L.Q. 461, 474 (1972); Note, *Liability of the Institutional Lender for Structural Defects in New Housing*, 35 U. CHI. L. REV. 739 (1968).

<sup>99</sup>As reported in the 1970 congressional hearings investigating section 235 purchases, the "FHA views itself solely as a mortgage insurer whose interest is in the adequacy of the security for the loan rather decent safe and sanitary housing for people." 1970 HEARINGS, *supra* note 22, at 4-5. This caveat emptor attitude was characterized as "unrealistic." *Id.* at 5. See also LeClerq, *Entitlement Under Section 235*, 25 S.C.L. REV. 1, 50 (1973).

The recommended change in FHA attitude is deemed essential by the author in Note, *Abuses in the Low Income Homeownership Programs—The Need for a Consumer Protection Response by the FHA*, 45 TEMPLE L.Q. 461, 469-75 (1968). HUD appropriately describes the FHA as not consumer-oriented. AUDIT REVIEW, *supra* note 23, at 6.

<sup>100</sup>See note 95 *supra* & accompanying text.

9. *Fee Appraisers.*—To insure that houses are properly appraised, fee appraisers must not be used and the appraisers who are employed directly by the FHA must be trained and adequately supervised.<sup>101</sup> In addition, pressure on appraisers to do an unrealistic volume of work must be eliminated.<sup>102</sup>

10. *Regressive Subsidy Scale.*—The regressive features of the subsidy scale should be eliminated.<sup>103</sup> Poorer persons should receive greater subsidies than those who are able to afford the more expensive homes under the program. Presently, the amount of subsidy can be all but one percent of the interest. Naturally, the more expensive the home, the more interest is involved, and therefore the greater the subsidy. Since only the least needy families can qualify to buy the more expensive homes, they receive more assistance than do poorer purchasers. If this subsidy feature were reversed, poorer families could buy better houses and be less plagued by the faulty conditions prevalent in the cheaper homes.

Additionally, the subsidy scale should be adjusted so that utility costs become an element in the subsidy determination. Presently, people in northern and southern climates bear unequal burdens in this regard since colder climates necessitate higher utility costs.

11. *Enforcement Powers of the FHA.*—Legislation should be enacted empowering the FHA to protect home purchasers under its programs. These powers should include those of investigation, including subpoena power, litigation in the buyer's behalf, and criminal and civil sanctions against fraudulent representations which lead to the conveyance of a section 235 home.

12. *Home Inspection Standards.*—Not only should the standards under which the FHA insures homes be more strictly administered, but the standards themselves should be raised. The

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<sup>101</sup>Presently, many inspectors performing section 235 appraisals are inadequately trained. See 1970 HEARINGS, *supra* note 22, at 6. HUD has recognized that it has these problems with appraisers who often do inadequate inspections and are not subject to proper supervision by superiors. See generally AUDIT REVIEW, *supra* note 23. See also EDSON & LANE, *supra* note 4, at 5:14. Training and performance of FHA appraisers were at the heart of the complaint in Davis v. Romney, 355 F. Supp. 29, 35 (E.D. Pa. 1973), *aff'd*, 490 F.2d 1360 (3d Cir. 1974).

<sup>102</sup>See AUDIT REVIEW, *supra* note 23, at 8, for a thorough discussion of the appraisal problem.

<sup>103</sup>These features are discussed elsewhere. See R. TAGGART, LOW-INCOME HOUSING: A CRITIQUE OF FEDERAL AID 80 (1970); V. Bach, *supra* note 88, at 14; B. Frieden, *supra* note 56, at 9.

attitude should not be allowed to prevail in FHA ranks that "anything most poor purchasers buy is probably better than what they had."<sup>104</sup>

With these changes, a more successful program is possible. Section 235 clearly has benefits to bestow. And the costs of prevention outlined above should be less than those which the FHA has incurred in the past in its administration of the "curative" section 104 and of foreclosed properties, repossessed when purchasers were forced out of their homes by economic necessity or physical uninhabitability.

## APPENDIX

### QUESTIONNAIRE FOR FHA 235 PROJECT

1. Case Number: ..... Survey Number: .....
2. Date of First Payment
 

Month:.....  
 Year:                      1969  
                                  1970  
                                  1971  
                                  1972
3. How long in house (in months) :
4. Price of Home (Loan Amount + \$200 rounded to nearest thousand) :
5. Type of Home:
 

New  
 Existing
6. Type of Seller:
 

Real Estate Speculator  
 Private Owner  
 Developer  
 Other

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<sup>104</sup>In *Northwest Residents Ass'n v. HUD*, 325 F. Supp. 65 (E.D. Wis. 1971), the district court held that property owners have standing to challenge the FHA's standards for real estate appraisals and mortgage approval done under section 235 auspices, and that the federal district court has jurisdiction to review FHA action in this regard. In this case, plaintiffs, in a class action, alleged that the FHA's permissive standards violated the stated statutory purpose of the National Housing Act of "a decent home and suitable living environment for every American family." See note 6 *supra*. The recent case of *Davis v. Romney*, 490 F.2d 1360 (3d Cir. 1974), reached the same result.

HUD itself recognizes that the "physical environmental standards required for properties to meet minimum acceptability requirements need to be reconsidered, upgraded or emphasized." AUDIT REVIEW, *supra* note 23, at 4.

7. Category of purchaser:
- Male
  - Female
  - Husband and Wife
  - Co-mortgagors
  - Other
8. Age of purchaser: By impression:..... Asked:.....
- Under 20
  - 21-30
  - 31-40
  - 41-50
  - 51+
9. Race of purchaser:
- Caucasian
  - Afro-American
  - Other

I. Information on the House Purchased

10. How many bedrooms does this house have?
- 1
  - 2
  - 3
  - 4
  - 4+
11. How many bathrooms does it have?
- 1
  - 2
  - 2+
12. How much did you pay for this house? .....
13. How much was the down payment? .....
14. Monthly payments (from FHA): .....
15. How much do you now pay in monthly payments for your house? .....
16. Subsidy: .....

II. Questions on the Purchase Process

17. How many homes did you look at before you purchased this home? .....
18. How long after seeing the house did it take you to make up your mind to buy the house?
- 1 day or less
  - 2 days—1 week
  - 8 days—2 weeks

15 days—1 month  
1 month +

19. Did you see the whole house (or the whole model) before you decided to buy it?

Yes  
No

Why not?

20. Was this house inhabited when you came to see it? (existing house only)

Yes  
No  
DK

21. How many times did you examine this house (or the model)?

1  
2  
3  
3+

22. At what times of the day were you shown this house?  
Was that before or after dark?

Before dark  
After dark

23. Did you ask a professional building inspector to evaluate this house before you bought it?

Yes  
No  
DK

24. Did you rely on the FHA inspection to find anything that was wrong with the house?

Yes  
No  
Didn't know FHA inspected

25. What factor most influenced you to buy this house?

(1) Good floor plan  
(2) Enough space for children  
(3) This was the only house we saw  
(4) Neighborhood or location  
(5) The price was right  
(6) Nice yard  
(7) Other

26. Why generally did you move?

(1) Wanted a house instead of an apartment  
(2) Needed more space for children

- (3) Racial makeup of the new neighborhood is better than that of the old
- (4) Other reasons relating to neighborhood
- (5) Had to leave old residence
- (6) Other

27. Did you pay the price that the seller (real estate agent) asked or did you attempt to bargain for a lower price? For more features?

Did not bargain  
Bargained price  
Bargained features

28. Who was the real estate agent for this house?

29. How did you select the real estate agent with whom you dealt?

- (1) Friend recommended
- (2) Newspaper ad
- (3) Saw sign on property
- (4) Other

30. Were you satisfied with the services of the real estate agent with whom you dealt?

Yes  
No

31. If not, why not?

- (1) He promised to make repairs and didn't make them
- (2) He rushed us through homes
- (3) He didn't answer questions we asked
- (4) He didn't mention major problems
- (5) Other
- (6) Don't know

32. Did the real estate agent make any claims as to repairs for which FHA would be responsible?

Yes  
No

Comments:

33. Did anyone tell you that your choice of homes was limited if you bought under the 235 program?

Yes  
No

34. If yes, who told you that?

Real estate agent  
Seller  
Other

35. How did you first hear about the 235 program?

- (1) Social worker
- (2) Legal Aid
- (3) Real estate agent
- (4) Loan company
- (5) Friend
- (6) Seller
- (7) Newspaper
- (8) Other
- (9) Don't remember

36. Are you satisfied with the home that you bought?

Yes  
No

37. If not, why not?

- (1) Too many repairs
- (2) Too costly to maintain
- (3) Burden of home ownership greater than expected
- (4) Don't like the neighborhood
- (5) Other

### III. *Willingness to Make Repairs*

38. Have you ever employed a repairman?

Yes  
No

39. If your house needed minor repairs (such as a leaky faucet, changing a fuse, or changing a furnace filter), would you either make the repairs yourself or hire a repairman?

- (1) Do it ourselves
- (2) Hire a repairman
- (3) Do it ourselves or hire a repairman, depending on the repairs
- (4) Can't afford minor repairs
- (5) Not willing to make minor repairs
- (6) Don't know

40. If your house needed major repairs (such as rewiring, a new furnace, or a new roof), would you either make the repairs or hire a repairman?

- (1) Do it ourselves
- (2) Hire a repairman
- (3) Do it ourselves or hire a repairman, depending on the repairs
- (4) Can't afford major repairs
- (5) Not willing to make major repairs
- (6) Don't know

IV. *Knowledge of Mortgage Contract  
and Legal Relationships*

41. Can your monthly payments go up?

Yes  
No  
DK

42. If yes, for what reasons can they go up?

- (1) Increased income
- (2) Increased insurance
- (3) Increased taxes
- (4) Insurance and taxes
- (5) Insurance and income
- (6) Taxes and income
- (7) Insurance, income, and taxes
- (8) Don't know

43. Is the interest you pay on your mortgage loan deductible from your incomes taxes?

Yes  
No  
DK

44. Did you know that FHA (Federal Housing Administration) played a part in your home purchase transaction?

Yes  
No

45. Did you think that FHA was making any guarantees to you about the quality of the house?

Yes  
No

46. Did you have an attorney's help when you bought your house?

Yes  
No

V. *Problems with the House and Repairs*

47. Have you had any trouble with your house?

I. *Roof*

- a. No problem
- b. It existed when bought house
- c. It developed after I bought house

Who repaired it?

- a. F.H.A. repair
- b. Other professional repair
- c. Self-repaired

- d. Seller repaired
- e. Other
- f. Still needs repair

Approximate cost of repair  
In Hundreds:

II. *Plumbing*

- a. No problem
- b. It existed when bought house
- c. It developed after I bought house

Who repaired it?

- a. F.H.A. repair
- b. Other professional repair
- c. Self-repaired
- d. Seller repaired
- e. Other
- f. Still needs repair

Approximate cost of repair

III. *Heating*

- a. No problem
- b. It existed when bought house
- c. It developed after I bought house

Who repaired it?

- a. F.H.A. repair
- b. Other professional repair
- c. Self-repaired
- d. Seller repaired
- e. Other
- f. Still needs repair

Approximate cost of repair

IV. *Electrical*

- a. No problems
- b. It existed when bought house
- c. It developed after I bought house

Who repaired it?

- a. F.H.A. repair
- b. Other professional repair
- c. Self-repaired
- d. Seller repaired
- e. Other
- f. Still needs repair

Approximate cost of repair

V. *Vermin (Pests)*

- a. No problems
- b. It existed when bought house

c. It developed after I bought house  
Who repaired it?

- a. F.H.A. repair
- b. Other Professional repair
- c. Self-repaired
- d. Seller repaired
- e. Other
- f. Still needs repair

Approximate cost of repair

VI. *Inside of House*

- a. No problem
- b. It existed when bought house
- c. It developed after I bought house

Who repaired it?

- a. F.H.A. Repair
- b. Other professional repair
- c. Self-repaired
- d. Seller repaired
- e. Other
- f. Still needs repair

Approximate cost of repair

VII. *Outside of House*

- a. No problem
- b. It existed when bought house
- c. It developed after I bought house

Who repaired it?

- a. F.H.A. repair
- b. Other professional repair
- c. Self-repaired
- d. Seller repaired
- e. Other
- f. Still needs repair

Approximate cost of repair

VIII. *Yard, driveway, etc.*

- a. No problem
- b. It existed when bought house
- c. It developed after I bought house

Who repaired it?

- a. F.H.A. repair
- b. Other Professional repair
- c. Self-repaired
- d. Seller repaired
- e. Other
- f. Still needs repair

Approximate cost of repair

48. Estimate the amount of money you have spent on repairs in the last year.
- (1) 0
  - (2) 1-100
  - (3) 101-300
  - (4) 301-500
  - (5) 500+ (Exact amount .....)
49. What repairs will you do yourself?
50. What repairs will require hiring help?
51. Which of these repairs would you make right now if it weren't for the lack of money?
52. Have you been cited (since you lived in this house) for a building code violation?
- Yes  
No
53. Who requested the city code inspection?
- Don't know  
Self  
Neighbor  
Other
54. What were the code violations?
- (1) Plumbing
  - (2) Heating
  - (3) Electrical
  - (4) Vermin
  - (5) Plaster
  - (6) Sidewalks
  - (7) Gutters
55. Did you receive notice from your loan company that FHA would make certain repairs for you?
- Yes  
No
56. Approximately when were you notified of F.H.A. responsibility?
- Month  
Year  
1971  
1972
57. Did you file a claim for F.H.A. repairs?
- Yes  
No

58. If you filed a claim with F.H.A., has your house been repaired?

Yes  
No

59. If yes, were you satisfied with the repairs made?

Not satisfied  
Satisfied

60. If not satisfied, why not?

Not properly completed  
Insufficient

Comments on F.H.A. Repairs and Claims process:

VI. *Purchaser's Last Home.*

61. Was your last home a house or an apartment?

Apartment  
House

62. If an apartment, was it in public housing?

Yes  
No

63. If a house, did you own or rent it?

Rented  
Owned

64. If you rented, did you experience any problems with your landlord?

Yes  
No

65. If yes, what were those problems?

- a. Non-payment of rent
- b. Lack or repairs by landlord
- c. Complaints about my children
- d. Others
- e. Multiple answers.

66. If you rented, were you ever asked to move out?

Yes  
No

67. If yes, why?

- a. Non-payment of rent
- b. Damage to apartment
- c. Too many children
- d. Apartment rehabilitated
- e. Urban renewal
- f. Other

68. How much was your rent or payments in your last home?

69. Did that amount include utilities?

Yes

No

70. Have you ever owned a home before you purchased this house?

Yes

No

71. If you have, why did you leave it?

- a. Moved for job
- b. Moved because house was taken
- c. Couldn't keep up expensive payments
- d. Wanted a better house
- e. Wanted a better neighborhood
- f. Other

72. How long did you live in your last home or apartment?

Under 1 year

1-3-years

4-6 years

6+ years

73. If less than 1 year, how many times did you move in the two years before you bought your house?

2 times

3 to 5 times

6 or more times

74. Have your parents ever owned their own home?

Yes

No

75. Do you feel that your house payments place too great a financial burden on you?

Yes

No

76. Have you ever missed any house payments?

Yes

No

77. If yes, for what reasons?

- a. Illness
- b. Laid off
- c. Strike
- d. Other

VII. *Personal Information*

78. Which members of the household are employed full time?
- |                   |     |
|-------------------|-----|
| Head of Household | Yes |
|                   | No  |
| Spouse            | Yes |
|                   | No  |
79. Which members of the household are presently employed part time?
- HOH  
Spouse  
Child  
HOH & Spouse  
HOH & Child  
Spouse & Child  
All three  
None
80. Present occupation of Head of Household? .....
81. Present occupation of spouse? .....
82. How long has the head of household been on his present job?
- More than 5 years  
More than 2 Years  
More than 1 year  
Less than 1 year
83. How long was he on his last job?  
(Only if on present job less than 1 year)
- More than 5 years  
More than 2 Years  
More than 1 year  
Less than 1 year
84. How long has the spouse been on his present job?
- More than 5 years  
More than 2 years  
More than 1 year  
Less than 1 year
85. How long was the spouse on his last job?  
(Only if on present job less than 1 year)
- More than 5 years  
More than 2 years  
More than 1 year  
Less than 1 year

86. What job did you hold when you bought this house?

Same  
Other  
Classification

87. How far have you gone in school?

Head of household

- (1) 1—6
- (2) 7
- (3) 8
- (4) 9
- (5) 10
- (6) 11
- (7) 12
- (8) Technical school
- (9) Some college
- (0) College graduate

Spouse

- (1) 1—6
- (2) 7
- (3) 8
- (4) 9
- (5) 10
- (6) 11
- (7) 12
- (8) Technical school
- (9) Some college
- (0) College graduate

88. How much is the gross salary/week of the head of household?

25 -50  
51 -75  
76 -100  
101-125  
126-150  
151-175  
176-200

89. How much is the spouse's gross salary/week?

25 -50  
51 -75  
76 -100  
101-125  
126-150  
151-175  
176-200

90. Do you have any other sources of income?

No  
Alimony or  
child support  
Welfare  
Other

91. If yes, how much is it per week?

25 -50  
51 -75  
76 -100  
100 +

92. Has there been any change in your family size since you bought your house?

No  
Additional child,  
children  
Loss of child  
Added spouse  
Loss of spouse  
Other addition  
Other loss

93. How many people now live in this house?

94. Does a husband live in this house? .....

Yes  
No

95. Who are the people living in the house?

Husband  
Wife  
Children  
Other family  
Non-relatives

96. If you had it to do over again, would you buy this house?

Yes  
No

Comments:

97. This house appears to the interviewer as follows:

- (1) Clean, well maintained.
- (2) Exterior dilapidated
- (3) Interior dilapidated
- (4) Interior in need of paint
- (5) Trash in yard
- (6) Broken windows

- (7) Yard needs to be mowed
- (8) Other conditions:
- (9) More than one bad condition

VIII. *Questions for Purchasers No Longer  
Living in Their 235 Houses.*

98. How long did you live in your house bought under the 235 program? In months:

99. Why did you leave?

- a. Didn't like owning my own home
- b. House was in bad condition
- c. Change of job to a different geographical area
- d. Financial reasons
- e. Unemployment
- f. Illness in family
- g. High repair costs
- h. Other

100. Describe where you are living now:

- a. House
- b. Apartment
- c. With relatives
- d. Public Housing
- e. Other

Comments:

# COMMENT

## CONGRESS AND THE PRESIDENCY AND THE IMPEACHMENT POWER

EDWARD MCWHINNEY\*

The current political conflict between Congress and the Presidency, and in particular the attempt of various groups in Congress to invoke the constitutional impeachment power<sup>1</sup> against the President, have a general scientific-legal interest that quite transcends the United States. Constitutional specialists of Great Britain and the Commonwealth, from whose Cromwellian constitutional era and its then dominant Puritan thinking on government so much of late eighteenth-century American colonial folklore on government stemmed, may well be intrigued by the public yearnings of a number of academic critics of the contemporary Presidency in favour of an "English"-style parliamentary executive for the United States in place of the present presidential executive system. Among other items for speculation or query on the part of British and Commonwealth constitutional lawyers may be why the founding fathers of the American Constitution deliberately wrote in to their new constitutional charter the British parliamentary institution of impeachment just as it was falling into practical disuse (and one might say, also, into public disgrace) in the country that gave birth to it; and why, in particular, the American constitutional founding fathers included the British parliamentary institution of impeachment, but specifically excluded the companion British par-

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<sup>1</sup>U.S. CONST. Art. II, § 4:

The President, Vice President and all civil officers of the United States, shall be removed from Office on impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

*See also id.* art 1, § 2 (the House of Representatives shall have the sole power of impeachment); art. I, § 3 (defining the Senate's role in cases of impeachment); art. II, § 2 (denial of presidential power to grant reprieves and pardons in impeachment cases); art. III, § 2 (denial of right to trial by jury).

liamentary institution of the bill of attainder,<sup>2</sup> though the two had tended to be used largely interchangeably in British constitutional history.

### I. COMPARATIVE LAW EXCURSES ON THE CONSTITUTIONAL SEPARATION OF POWERS

Comparisons between one constitutional system and another are too often illusory, since they tend to focus too exclusively upon the verbal prescriptions in the constitutional charters-as-written, without regard to the leavening effects of actual constitutional practice. To ignore or underplay the *rôle* of developing constitutional custom or convention is to mistake the abstract constitutional law as written, or law-in-books, for the constitutional law-in-action—in Ehrlich's well-known term the constitutional "living law."<sup>3</sup> The atavistic longings by some American senators and their supporting publicists today for an "English"-style parliamentary executive reveal themselves to be the pursuit too often of a dream that has no present-day, concrete reality—the English constitutional law-in-books of yesterday, or the day-before-yesterday, as elevated to the status of constitutional folklore by the rightly celebrated A. V. Dicey, high priest of late nineteenth-century English constitutionalism.<sup>4</sup> Dicey's lipidarian constitutional maxim of the sovereignty of Parliament,<sup>5</sup> taken beyond the stage of being a purely abstract juridical proposition—a legal philosopher's ideal-construct designed to provide a governmental-institutional framework and rationalisation for John Austin's early nineteenth-century definition of law<sup>6</sup>—is clearly untrue as a purported factual description of the constitutional law-in-action in the England even of Dicey's own special time-era. The evolution of the cabinet

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<sup>2</sup>*Id.* art. I, § 9: "No Bill of Attainder or ex post facto Law shall be passed."

<sup>3</sup>E. ERLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (Mill trans. 1936).

<sup>4</sup>A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (1st ed. 1885), ran through eight editions in the first thirty years after its original publication. The eighth edition, the last to be printed in Dicey's own lifetime, had seven further printings before a ninth, posthumous edition (edited by E.C.S. Wade) was published in 1939, to remain the standard constitutional law text-book for British, British Empire, and Commonwealth law schools at the time of World War II.

<sup>5</sup>A.V. DICEY, *THE LAW OF THE CONSTITUTION* 39 (9th ed. 1939); E. McWHINNEY, *JUDICIAL REVIEW* 32 (4th ed. 1969).

<sup>6</sup>J. AUSTIN, *JURISPRUDENCE* (4th ed. 1879), is consistently cited by Dicey when he seeks to elaborate on his own concept of the sovereignty of Parliament.

system, so amply charted by Bagehot,<sup>7</sup> Dicey's illustrious predecessor, had made of modern British government an executive-weighted system, even by the time Dicey was writing his first edition. This process of augmenting executive power, at the expense necessarily of legislative and even judicial power, was reinforced, strengthened, and ultimately consummated by the parallel growth and centralization of the English party system dominated by the party executive, which, in the case of the Government party, ensured domination by the Prime Minister of the day. It is the factor—not adverted to in the various accepted elaborations of the constitutional law-in-books of today—that explains in considerable measure the plebiscitarian character of British and Commonwealth elections today, and that effectively makes the British and Commonwealth Prime Minister of today, far more than the American President, a constitutional autocrat whose main limits are his own constitutional sense of self-restraint and not much more. These American constitutionalists today who perceive, in the British and Commonwealth-style parliamentary executive, a model for a weak executive in contradistinction to an American presidential executive which they see as overly strong, are, it may be suggested, merely deluding themselves. For the British and Commonwealth parliamentary executive, as law-in-action today, seems very much stronger than the American presidential executive, and there are very obvious external, objective institutional reasons for this. The most notable explanation lies in the Prime Minister's right of dissolution of the Parliament at any time<sup>8</sup> and his power, thereby, to compel members of the legislature to submit themselves to fresh elections at a politically opportune time of his own choosing. The dissolution power was once merely a privilege, for whose actual invocation the Prime Minister once had to shew constitutional cause;<sup>9</sup> but now it has ripened, through developing constitutional custom and convention, into a right the occasion and manner of whose use rests within the sole discretion of the Prime Minister.<sup>10</sup>

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<sup>7</sup>W. BAGEHOT, *THE ENGLISH CONSTITUTION* (1867).

<sup>8</sup>Concerning the power of dissolution, see generally A.V. DICEY, *THE LAW OF THE CONSTITUTION* 432, 598 (9th ed. 1939); W. JENNINGS, *THE LAW AND THE CONSTITUTION* 82-83, 165 (3d ed. 1933); W. JENNINGS, *CABINET GOVERNMENT* 382-437 (2d ed. 1951).

<sup>9</sup>A.V. DICEY, *THE LAW OF THE CONSTITUTION* (9th ed. 1939); W. JENNINGS, *THE LAW AND THE CONSTITUTION* (3d ed. 1933); W. JENNINGS, *CABINET GOVERNMENT* (2d ed. 1951).

<sup>10</sup>See H. EVATT, *THE KING AND HIS DOMINION GOVERNORS* (1936). This work deals with the then Mr. Justice H.V. Evatt's pioneer study in British Empire and British Commonwealth constitutional development.

It is a salutary weapon with which a powerful executive can curb and control a recalcitrant legislature, and though it is normally only invoked in the rare political case of a minority government depending for its survival in the Parliament on the support of splinter parties, its threat is always available to the Prime Minister for use, if need be, to discipline rebels or intransigents within the Government's own party. In the unusual Commonwealth example (though not in Great Britain itself) of a genuinely operational bicameral legislative system, the Prime Minister's right of dissolution may extend, under certain circumstances, to compel fresh elections for both houses of the legislature.<sup>11</sup> For an exact American constitutional equivalent, one would have to envisage the American President as being armed with the unilateral constitutional power to dissolve both Houses of Congress and to compel all members of the House of Representatives and of the Senate to submit themselves to fresh elections at a time of the President's own choosing. Beyond that, the detailed point-by-point examination and comparison of the respective ambits of the powers of a British and Commonwealth-style Prime Minister and the American President suggest that the balance is tilted very decisively against American presidential power. Powers that a Prime Minister exercises without constitutional constraint—nomination of Cabinet Ministers, appointment of senior civil servants, Ambassadors, judges of the highest and the lowest courts, conclusion and ratification of treaties, declarations of war—are, in the case of the American Presidency, subjected to the elaborate system of built-in constitutional checks and balances, involving the interposition of countervailing legislative power, usually in the form of a requirement of legislative ratification of executive nominations<sup>12</sup> and sometimes legislative ratification by special, and not merely ordinary, majority.<sup>13</sup>

## II. IMPEACHMENT: YESTERDAY, TODAY, AND TOMORROW

There are two striking paradoxes in the American Constitutional Convention's borrowing of the institution of presidential impeachment from English constitutional history. *First*, impeachment was definitely on the way out of the British constitution just as the American founding fathers were deliberating. Indeed, if the Constitutional Convention had sat only a decade later and

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<sup>11</sup>For an example in this regard, see COMMONWEALTH OF AUSTRALIA CONST. art. 57 (1900).

<sup>12</sup>See U.S. CONST. art. II, § 2.

<sup>13</sup>*E.g.*, the requirement of a two-thirds majority in the Senate to ratify treaties entered into by the Executive. *Id.* art. II, § 2.

its members thus been able to view at first hand the personal envy and malice directed by Warren Hastings' enemies into his impeachment trial before the British Parliament over the long wearying years from 1788 to 1795, it is possible that the Convention members might have had some sober second thoughts on the merits of impeachment as a constitutional weapon.<sup>14</sup> Although

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<sup>14</sup>Rather surprisingly, the House Judiciary Committee, in its recent appraisal of the historical contribution of the English constitutional experience to the American Constitution's impeachment provisions, has given great weight to the impeachment of Warren Hastings:

The impeachment of Warren Hastings, first attempted in 1786 and concluded in 1795, is particularly important because contemporaneous with the American Convention debates. Hastings was the first Governor-General of India. The articles indicate that Hastings was being charged with high crimes and misdemeanors in the form of gross maladministration, corruption in office, and cruelty toward the people of India.

STAFF OF HOUSE COMM. ON THE JUDICIARY, 93RD CONG., 2D SESS., REPORT ON CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 7 (Comm. Print 1974) [hereinafter cited as REPORT ON GROUNDS FOR IMPEACHMENT].

It is difficult to see any positive influence that the Warren Hastings impeachment could have had on the American Constitution, concluded and adopted before the Hastings impeachment trial itself had even begun. No doubt, the House Judiciary Committee was basing its conclusions here on the sustained public campaign mounted against Warren Hastings by his implacable political enemies and notably by his long-time associate and bitter rival from the Indian colonial administration days, Philip Francis. Francis, the probable author of the vitriolic "Letters of Junius," a series of polemical attacks on late 18th-century English public figures which rank among the masterpieces of partisan political invective, had served under Hastings when the latter was Governor-General of Bengal, and seems to have occupied himself in constant political intrigues against his superior, probably in part because of frustrated personal ambition himself to be named as Governor-General. Reproached by Hastings as being "void of truth and honour," Francis demanded, and lost, a duel with pistols against Hastings and then returned to England where he managed to secure nomination to a "rotten borough," and entered Parliament in 1784. Francis then launched his impeachment campaign against Hastings, culminating in Parliament's impeachment resolution of 1787 from which the seven-year trial, from 1788 to 1795, resulted. The accusations against Hastings, however, were all rejected with the House of Lords' verdict of not guilty, rendered in 1795. Hastings himself, though financially ruined by his successful impeachment defence, received some degree of public atonement and recognition before his death, as evidenced in various honours: for example, his being invited to give expert evidence on Indian affairs before the two Houses of Parliament, and his being made a member of the Privy Council. *See generally* G. GLEIG, MEMOIRS OF THE LIFE OF WARREN HASTINGS (1841); A. LYALL, WARREN HASTINGS (1889); G. MALLESON, LIFE OF WARREN HASTINGS (1894); L. TROTTER, WARREN HASTINGS (1894); S. WEITZMAN, WARREN HASTINGS AND PHILLIP FRANCIS (1929). Lord Macaulay's celebrated essay on Warren Hastings, written originally as

it is usual to say that impeachment disappeared from English constitutional law because it became logically obsolete with the emergence of responsible government, it is also a fact that the informed public and governmental reaction against Warren Hastings' ordeal was so great that impeachment was only used once again in England, and that shortly thereafter, against Viscount Melville in 1806,<sup>15</sup> though the suggestion of an impeachment was raised, briefly and ridiculously, in the case of the Foreign Secretary, Lord Palmerston, in 1848.

The second paradox in the American Constitutional Convention's borrowing of impeachment from English constitutional history for direct insertion into the American constitution is that the Constitutional Convention at the same time rejected impeachment's English constitutional analogue, the bill of attainder, with which, for all practical purposes at the significant periods in English development, it was virtually interchangeable. Thus Pym had preferred the judicial aura of impeachment proceedings against both Strafford and Laud, but he was easily persuaded to drop impeachment in favour of the more expeditious procedure (and one certainly less irksome to those carrying the burden of proof) of attainder.<sup>16</sup> The somewhat casual and arbitrary character of

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a review of Gleig's book, is to be found in T. MACAULAY, *CRITICAL AND HISTORICAL ESSAYS CONTRIBUTED TO THE EDINBURGH REVIEW* (1850).

<sup>15</sup>Raoul Berger in his study, *Impeachment for "High Crimes and Misdemeanors,"* 44 S. CAL. L. REV. 395, 405 (1971), was surely justified in noting the purely ludicrous aspects of Lord Melville's impeachment. The alleged offence that was the subject of the impeachment was already twenty-four years old at the time of trial, and Lord Melville himself had already resigned from his Cabinet post at the time that the process was initiated against him in the House of Commons. Lord Melville was a very skillful politician who had achieved a sufficiently dominant position in regional Scottish politics to have earned the nickname "King Harry the Ninth." His impeachment probably stemmed from partisan political opposition rather than from constitutional-legal considerations as such. After his acquittal in the impeachment trial, Lord Melville was offered, but declined, advancement in nobility to the rank of Earl. See generally H. FURBER, *HENRY DUNDAS, FIRST VISCOUNT MELVILLE* (1931); C. MATHESON, *LIFE OF HENRY DUNDAS, FIRST VISCOUNT MELVILLE* (1933).

<sup>16</sup>The House Judiciary Committee, in its recent review of the English constitutional experience with impeachment, suggests that the switch by the Puritan opponents of Strafford to attainder instead of impeachment was dictated by respect for Strafford's possible eloquence in his own defence in an impeachment trial. Rather archly, the House Judiciary Committee thus chooses to pass over, sub silentio, the more obvious explanation that an attainder, if anything, could be even more open-ended and deliberately vacuous in its specifications than an impeachment count, *REPORT ON GROUNDS FOR IMPEACHMENT* 5 & n.3. Berger's study, republished by the House Judiciary

this procedural switch was salved by acceding to the condemned's petition to be executed by the axe and not by the ordinary brutal punishments of the time. The American Constitutional Convention, in any case, sitting a century and a half later, expressly wrote the one institution, impeachment, into the American Constitution and expressly wrote the other, the bill of attainder, out.<sup>17</sup>

However romantic it may seem to American constitutional students today, the institution of impeachment has a rather mixed history in English constitutional law. At the time of its earliest apparent origins, in the thirteenth century, it was a simpler and less honorific alternative to the ordinary method of trial for treason, namely trial by battle.<sup>18</sup> Maitland estimated that there had been less than seventy cases of impeachment in the whole of English constitutional history, and that a full quarter of these belonged to the period 1640 to 1642.<sup>19</sup> The judicial trappings of the whole impeachment process and the somewhat self-serving rationalizations of subsequent Puritan historians need not conceal the fact that impeachments were, in too large measure, purely vengeful acts against defeated political office-holders, and that they were too often achieved by arbitrary or colourable legal procedures that would hardly stand up against contemporary tests as to valid constitutional acts. The original impeachment counts against Strafford had, perforce, to make an ally of vagueness and reach out for formulae like "endeavouring to subvert the fundamental laws of the kingdom." But even cloudy concepts such as these

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Committee, seems more straight-forward in its approach to the issue of the crucial procedural switch from impeachment to attainder in Strafford's case than that of the Committee's own staff, even though Berger himself may be perhaps unnecessarily periphrastic in his own criticisms of that switch.

Both studies published by the House Judiciary Committee, it may be suggested, suffer from the defect of being overly formalistic, or even deferential, in their approach to old English constitutional precedents, and do not sufficiently examine the legal claims and rationalizations advanced by the rival political factions—the legal superstructure—in the context of the underlying interests-conflicts from which those legal claims actually stemmed—the socio-economic infrastructure.

<sup>17</sup>U.S. CONST. art. I, § 9.

<sup>18</sup>D. MEDLEY, *ENGLISH CONSTITUTIONAL HISTORY* 164 (4th ed. 1907).

<sup>19</sup>F. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 317 (1909). The House Judiciary Committee, by contrast, puts the figure somewhat higher, suggesting over 100 impeachments as having been voted by the House of Commons during the period 1620 to 1649 alone. The House Judiciary Committee concedes, however, that its statistics have been drawn largely from secondary sources, and this on account of the "paucity and ambiguity of the records" of English cases of impeachment. *REPORT ON GROUNDS FOR IMPEACHMENT* 5-6.

could not sustain public scrutiny in the case of Archbishop Laud, and on strictly pragmatic grounds the parliamentary leaders, as we have noted, therefore abruptly switched course to utilize bills of attainders in both cases.

If we follow the historical course of impeachment proceedings in England from the earliest examples in the reigns of Edward II and Richard II to the last real "modern" exercise (against Warren Hastings) near the close of the eighteenth century, we see a rather sorry succession of acts of political vengeance, not merely in the Stuart times but as late as the death of Queen Anne in 1714 when the triumphant Whig party proceeded to impeach the late Queen's Tory ministers, Oxford, Bolingbroke, and Ormond.<sup>20</sup> It is not surprising that, on the record of its application even in more modern times, the nineteenth-century historian, Medley, concluded that impeachment was "the chief means of getting rid of political opponents . . . this method of attacking [one's] enemies."<sup>21</sup> Reacting to the clear fact that, in its English constitutional development and application, impeachment had become a high political act that was only colourably judicial or legal, the great English historian, Maitland, sagely concluded:

It seems highly improbable that recourse will again be had to this ancient weapon [impeachment] unless we have a time of revolution before us. If a statesman has really committed a crime then he can be tried like any other criminal: if he has been guilty of some misdoing that is not a

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<sup>20</sup>Berger cites the cases of the Earl of Oxford and Viscount Bolingbroke, whose impeachments were based on "giving pernicious advice to the Crown," as serving to "outline the boundaries of the phrase 'high crimes and misdemeanors' at the time the [American] Constitution was adopted." 44 S. CAL. L. REV. at 413. To say this without at the same time noting the additional fact, (well-known to British and Commonwealth constitutionalists) that the indictments and their counts against Oxford and Bolingbroke were framed by the Whig Ministers of the successor German (Hanoverian) dynasty against the former Tory Ministers of the recently dead Queen Anne, is surely to veil the casuistry and special pleading on which retroactive constitutional processes such as these rested. Even the earliest precedents cited in the Berger study—the two de la Poles, Michael in 1388 and William in 1450, *id.* at 408-09, reveal themselves, on examination, as being, rather, examples of historical bad luck—being on the wrong political side at the wrong time in the difficult century of the Yorkist-Lancastarian "War of the Roses" struggles—than scientific legal categories that can usefully serve as precedents for contemporary constitutional systems. On the de la Pole Cases, see 2 W. STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND IN ITS ORIGIN AND DEVELOPMENT 497 (4th ed. 1896); 3 W. STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND IN ITS ORIGIN AND DEVELOPMENT 149 (5th ed. 1896).

<sup>21</sup>D. MEDLEY, ENGLISH CONSTITUTIONAL HISTORY 167 (4th ed. 1907).

crime, it seems far better that it should go unpunished than that new law should be invented for the occasion; and that by a tribunal of politicians and partisans.<sup>22</sup>

Looking to the incorporation of the old English institution of impeachment into the American Constitution at the end of the eighteenth century, it is difficult to avoid the conclusion that the American founding fathers either had only passing or superficial acquaintance with its detailed English constitutional record or else were overly impressed or misled by the English Puritan apologists' special pleadings in behalf of their own side of the seventeenth-century English constitutional contest between executive and legislature and, to get down to bed-rock, in behalf of their own side in the underlying economic struggle between the entrenched hereditary aristocracy and the emerging landed proprietor class.

The task of the constitutionalist is always, of course, to try to give new meaning to old constitutional forms and institutions in ways that attempt to harmonize them with contemporary general national constitutional practice and received traditions. There are obviously two main courses open in regard to the impeachment institution in American constitutional law today. First, it can be argued on the basis of its original English historical development over the five centuries of its actual use in English constitutional law, that the impeachment process is a high political act, a decisional framework turning upon political considerations and not on law. But the consequence of recognizing the essentially political aspects of an impeachment process would seem to be an obligation of public candour, involving the dropping of any implication that it is a "judicial" process or that the actual decision in the process would turn on "legal" considerations, involving, for example, the proper discharge of the normal burden of proof resting on the prosecution in a criminal case. Logically, this would seem to suggest also the transfer of jurisdiction as to impeachment processes from the House Judiciary Committee to some more frankly and avowedly political Committee of the House. No doubt, under these circumstances, impeachment would become politically easier to bring about; but it would be achieved openly and through the political processes, and without any vicarious prestige coming from a false invocation of the judicial mystique, as happened, for example, in the English political impeachments of the seventeenth and eighteenth centuries.

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<sup>22</sup>F. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 477 (1909).

The second main course open in regard to impeachment, in its post-1787 *rôle* as a received-English element in the American Constitution, is to insist upon justicializing it more than ever, and in a way that tries honestly to eliminate the casual arbitrariness that pervaded its high political use in old English constitutional history. On this view, while the House Judiciary Committee would certainly be the only appropriate organ to initiate and carry forward the preliminary examination of impeachment grounds, the definition that the House Judiciary Committee itself has just released as to the legal basis for impeachment seems unacceptable in the light of continuing, post-1787 American constitutional traditions and practice. To say that a President is open to impeachment for "constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself"<sup>23</sup> is to offer an essentially self-defining test, quite as open-ended as any of the high political indictments offered up by the temporarily successful English constitutional factions in the great partisan battles of the fourteenth and seventeenth centuries. In American constitutional terms, it might be suggested that you could drive a horse and cart through the House Judiciary Committee's current essay at definition of impeachment, and that that definition would normally offend against even fifth amendment due process ("vagueness") standards as defined by the United States Supreme Court in recent decisions.<sup>24</sup> Why not, for example, try to reach acts that are "deserving of punishment according to the healthy public sentiment of the people," to cite the celebrated amendment to the German Criminal Code, inserted by the Nazi regime in 1935;<sup>25</sup> or why not, for that matter, adopt the even more comprehensive and all-embracing category of Stalinist-era Soviet criminal law, which proscribed all "socially dangerous acts or omissions?"<sup>26</sup> Rather than try to write into American constitutional law formless categories that one might come to regret in other, politically calmer times, or that could return to haunt later Presidents, the solution, in present-day

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<sup>23</sup>REPORT ON GROUNDS FOR IMPEACHMENT 26.

<sup>24</sup>The elements of the due process doctrine of vagueness have been developed in a large body of Supreme Court precedent. The cases are categorized in, *e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). See also *Amsterdam, The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

<sup>25</sup>*Gesetz zur Änderung des Strafgesetzbuchs vom*, (Law of June 28, 1935), [1935] RGBl. I 839.

<sup>26</sup>RSFSR art. VI (1926). See also J. HAZARD, *LAW AND SOCIAL CHANGE IN THE U.S.S.R.* ch. 4 (1953); J. HAZARD, I. SHAPIRO & P. MAGGS, *THE SOVIET LEGAL SYSTEM* ch. 9 (1969).

terms, would seem to be to have the matter returned to the House Judiciary Committee with instructions to develop some more precisely and rigorously defined counts, rooted in strictly juridical terms and, thus, more in keeping with the precedents of American constitutional law as developed and interpreted by the United States Supreme Court in modern times.

### III. INSTITUTIONAL REFORM:

#### THE PRESIDENCY, CONGRESS, AND THE SUPREME COURT

The separation of powers under the American Constitution has never been a static thing, with the relationship between the three main institutions—the Presidency, Congress, and the Supreme Court—jelled once and for all in some bygone age. Instead, these three institutions show a shifting pattern of relationships *inter se*, with sometimes one institution being dominant in its relation to the other institutions, and sometimes the others in their turn. Thus, we see the movement from strong Supreme Court to strong President to strong Congress in the progression from a dominant, conservative “Old Court” majority, to a strong Presidential authority under President Franklin Roosevelt, particularly after his reelection to a second term and the resultant “Court Revolution” of 1937; and then the further progression from a strong Presidency to a strong Congress with the beginnings of a resurgence of Congress under the Truman Presidency and with Congress’ assumption of a paramount decision-making *rôle* under the Eisenhower Presidency. Perhaps we can see a similar cyclical swing in operation in the period of renewed strong presidential authority under the Kennedy, Johnson, and first Nixon administrations, followed by a newly revived and aggressive Congress in the second Nixon administration.

Suggestions for constitutional change in the direction of permanently tilting the balance of governmental powers in favour of one or other main institution—whether the Presidency, Congress, or the Court—have to be viewed in terms of their long-range, as well as their immediate and short-range, constitutional implications. There is a danger in ad hoc responses to particular political problems of the day, that seek to postulate general or universal constitutional principles as the solvents for those short-range problems. The twenty-second amendment to the American Constitution looks, in historical retrospect, too much like an act of retroactive political vengeance against President Roosevelt, and bad constitutional law in the process—very much like closing the barn door after the horse has bolted. Those who railed against a strong Supreme Court when it was dominated by the con-

servative-leaning "Old Court" majority perhaps changed their constitutional-institutional principles too easily when they espoused the cause of judicial policy-making in the subsequent period of the liberal, activist Court majority of the Roosevelt-Truman eras. The current, once again seemingly conservative-leaning majority has brought a further reshuffling of ranks among constitutionalists as to the merits of judicial policy-making and of a strong, activist Supreme Court, whether liberal activist or conservative activist. It may be suggested that constitutional-institutional positions that are subject to such a remarkable *volte face* in so short a period of time begin to look suspiciously like constitutional special pleading.<sup>27</sup>

There is little doubt that any revival of the presidential impeachment power in the United States, a century after its one great and unfortunate use against President Andrew Johnson, would, whatever its result, seriously weaken the institution of the Presidency and tilt the balance of governmental powers under the Constitution decisively, and perhaps permanently, in favour of Congress. The actual decision whether or not to invoke the presidential impeachment power should be viewed not merely in relation to the potential role of the impeachment process as a remedy—one remedy among a number of remedies—for correcting current claimed evils in the office of the Presidency, but also in terms of the future orientation and direction that one wishes to give to the system of government as a whole. The decision to impeach or not to impeach must therefore be approached soberly, and not rhetorically. A reduced or diminished Presidency with the inter-institutional balance shifted substantially in the direction of Congress, could be approached by other means, for example, by strengthening the countervailing institution, Congress, through extending the term of Congressmen, the two-year term for members of the House of Representatives being, by all comparative law counts, unnecessarily, even absurdly, short. Another method, clearly, is to expand even further the Congressional investigatory rôle,<sup>28</sup> and perhaps to develop an independent, permanent govern-

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<sup>27</sup>By contrast, however, Arthur M. Schlesinger's current *mea culpa* in regard to his earlier publicist role in support of strong presidential executives—Jackson, Franklin Roosevelt, and Kennedy—seems a genuine latter-day expression of regret for earlier partisan enthusiasm, though it may be submitted that Professor Schlesinger's compensating reaction today, against the Presidency and in favour of congressional power, is itself an overreaction. See generally A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* 377 *et seq.* (1973).

<sup>28</sup>Note here the enormous expansion of the congressional investigatory power, as constitutional law-in-action, since the original narrow judicial

mental investigatory function based in the Department of Justice itself, somewhat along the lines of the Soviet and East European Procuracy.<sup>29</sup> The more direct approaches to reducing the Presidency by reducing the powers and privileges of the office—for example, by limiting Presidents to a single term<sup>30</sup>—seem, from a distance, to be institutional overreactions to the particular problems of a particular Presidency. “English”-style solutions, such as introducing into the Constitution a formal motion of no-confidence in the President, to be initiated by Congress, seem, at best, superficial and unscientific, since based on a misunderstanding, on the part of their sponsors, of the nature and character of no-confidence motions in British and Commonwealth constitutional law-in-action. Long-range, and in the light of the very real legal disabilities inhering in the office of the American President in comparison to other Western executives, and having regard to the far greater political, military, and economic responsibilities of the American Presidency in comparison to those other executives, it is difficult to avoid the conclusion that the more persuasive constitutional argument today is for a further strengthening of the American Presidency rather than for a weakening of it. Perhaps the question of a presidential power of dissolution of both houses of Congress should be examined at the same time as current proposals for the attenuation of presidential prerogatives.<sup>31</sup> In any case, it should never be forgotten that the foremost victims of any reduction in the office of the Presidency are likely to be the “strong” Presidents of the future who will, like Presidents Roosevelt, Truman, and Kennedy before them, seek to fill any gaps in constitutional authority by legislating boldly in cases of urgent national need hardly envisaged by the original founding fathers of the Constitution.

#### IV. POSTSCRIPT: “THE BATTLE OF THE BOOKS”

In a study published in February, 1974, James D. St. Clair and his associates, as attorneys for the President, contended that the United States constitutional power as to impeachment extends only to indictable crimes and cannot be applied to purely “political” acts of the President:

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definitions of its limits in *Kilbourn v. Thompson*, 103 U.S. 168 (1880), and *McGrain v. Daugherty*, 273 U.S. 135 (1927).

<sup>29</sup>H. BERMAN, *JUSTICE IN THE U.S.S.R.* 238 *et seq.* (rev. ed. 1963); G. MORGAN, *SOVIET ADMINISTRATIVE LEGALITY* (1962).

<sup>30</sup>See A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* 386-89 (1973).

<sup>31</sup>*Id.* at 413.

It is clear from the context of the constitutional commitment to due process that the Framers [of the United States Constitution] rejected the political impeachments. They included in the impeachment provisions the very safeguards that had not been present in the English practices. They narrowly defined the grounds for impeachment, required various procedural safeguards and eliminated the non-legal processes like bills of attainder and address that had worked hand-in-hand with the English political impeachments. . . .

The English precedents clearly demonstrate the criminal nature and origin of the impeachment process. The Framers adopted the general criminal meaning and language of those impeachments, while rejecting the 17th century aberration where impeachment was used as a weapon by Parliament to gain absolute political supremacy at the expense of the rule of law. . . . Thus the evidence is conclusive on all points; a President may only be impeached for indictable crimes. That is the lesson of history, logic, and experience on the phrase "Treason, Bribery and other high Crimes and Misdemeanors."<sup>32</sup>

In an article published in the *Yale Law Journal*,<sup>33</sup> highlighted by a plethora of homely, if not always relevant-seeming aphorisms, and by a prodigal recourse to Bartlett's *Familiar Quotations*,<sup>34</sup> as well as by the author's penchant for pejorative, *ad hominem*-

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<sup>32</sup>J. ST. CLAIR, J. CHESTER, M. STERLACCI, J. MURPHY, & L. SMITH, AN ANALYSIS OF THE CONSTITUTIONAL STANDARD FOR PRESIDENTIAL IMPEACHMENT (SUMMARY) 1-2, 6 (1974) [hereinafter cited as ST. CLAIR].

<sup>33</sup>Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111 (1974).

<sup>34</sup>*E.g.*, "When the client proclaims that he will 'fight like hell' to balk impeachment it may be expected that his lawyer will follow suit." *Id.* at 1137. "[D]efense lawyers are notoriously not the best source of constitutional history . . ." *Id.* "[A]s J. R. Wiggins said, . . . 'History thereafter may become what lawyers mistakenly said it was therefore.' 'Legal history,' said Justice Frankfurter, 'still has its claim.'" *Id.* at 1137-38 (footnotes omitted). "Constitutional analysis need not depart from common sense . . ." *Id.* at 1143 (footnote omitted). "Shades of the dissolute Duke of Buckingham!" *Id.* at 1152. "Mr. St. Clair's reading of history underlines anew the wisdom of Pope's injunction—'Drink deep, or taste not the Pierian spring.'" *Id.* at 1153. "'Historical reconstruction,' said a distinguished English historian, Sir Herbert Butterfield, 'must at least account for the evidence that is discrepant, and must explain how the rejected testimony came to exist.'" *Id.* at 1155 (footnote omitted). "Judges too require lawyers to meet the arguments of opposing counsel." *Id.* "An 'acquittal so obtained,' said Macaulay, 'cannot be pleaded in bar of the judgment of history.'" *Id.* (footnote omitted).

style argumentation,<sup>35</sup> Raoul Berger attacked what he characterises as "Mr. St. Clair's 'Instant History.'"<sup>36</sup> And so we have a fresh joinder of issue as to the meaning today of the power of impeachment in the United States Constitution.

The St. Clair thesis, which seems to essay to apply contemporary American legal realist techniques to seventeenth century English constitutional history—the most used, or abused, historical source for the late eighteenth century American constitutional drafters—would see a two-way distinction between *criminal im-*

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<sup>35</sup>*E.g.*, "[T]he [St. Clair] memorandum is but 'lawyer's history,' a pastiche of selected snippets and half-truths, exhibiting a resolute disregard of adverse facts, and simply designed to serve the best interests of a client rather than faithfully to represent history as it actually was." *Id.* at 1137. "The value of such 'history' is illuminated . . ." *Id.* at 1137 n.142. "Mr. St. Clair muddies the waters . . ." *Id.* at 1148. "This is a hair raising description [by Mr. St. Clair] . . ." *Id.* at 1152. "Mr. St. Clair's conclusion . . . reveals unfamiliarity . . ." *Id.* "Let me close with a few additional examples of discriminatory selectivity . . ." *Id.* at 1153. "Throughout, Mr. St. Clair plays a tattoo . . ." *Id.* "To ignore these statements while concentrating attention on 'bribery' is to deal in halftruths and to stray from candor." *Id.* at 1154.

Enough has been set out to expose Mr. St. Clair's cavalier treatment of history; and though it is tempting to invoke the Latin maxim, so often applied by the courts—false in one thing, false in everything—I prefer rather to forego analysis of the rest of the 61-page St. Clair memorandum in order to spare the reader a needlessly wearisome and tedious journey. Against this background it is sheer effrontery to say, as does Mr. St. Clair . . .

*Id.* "In conclusion, Mr. St. Clair has resolutely closed his eyes to adverse facts throughout . . ." *Id.* "When Mr. St. Clair . . . wraps himself in the cloak of pseudo-history, he lays himself open to the suspicion that he is not so much engaged in honest reconstruction of history as in propaganda . . ." *Id.* at 1155.

What is perhaps surprising in all this is not Mr. Berger's resort to Swiftian-style invective, but that the student editors of the *Yale Law Journal* should regard the time of the present constitutional "Great Debate" as ripe for a departure from their usual strict practice of excluding editorializing or recourse to personalities in scientific-legal publications.

<sup>36</sup>*Id.* at 1137. Mr. Berger may be, perhaps, a little arch in his protestations as to the scholarly detachment of his own writings and published opinions from the exigent here-and-now of current Watergate-era partisanship when he describes his own works as "[c]omposed in the quiet of a university, uninfluenced by fees or hopes of preferment . . ." *Id.* at 1138. His first study, *supra* note 15, was certainly prepared before the Watergate affair, being directed towards an earlier American-conservative-liberal skirmish over Mr. Justice Douglas of the Supreme Court; the later public statements by Mr. Berger on the impeachment issue can hardly claim the benefit of any *a priori* absolution from "partisan bias." Berger, *supra* note 33, at 1138.

peachments directed essentially against criminal misfeasance in public office and *political* impeachments in which the criminal processes as to impeachment, as developed from mediaeval times, were applied by one partisan group of the two rival groups in the great English political struggles of the seventeenth century to get rid as expeditiously and as finally as possible of their political enemies—in effect, and in ultra-realist fashion, a sort of seventeenth century English-style “lynch law.” By contrast, Mr. Berger’s interpretation of the same seventeenth century English constitutional history is somewhat more romantic and tends to see those events in rather more categorical, black and white terms. It accepts, essentially, the Parliamentary forces and their historical apologists’ version of what was, after all, a complex struggle between rival socio-economic forces in a rapidly changing England, already on the threshold of Empire.

Neither historical approach, it may be suggested—the American legal realist competing interests-based mode of analysis, nor the neoromantic “children of light *versus* children of darkness” conception—is fully accurate, a fact perhaps explained in part by the two main protagonists’ evident lack of full familiarity with that alien (English) constitutional history of an earlier century that they are, as contemporary American scholars, attempting to interpret to guide the solution of contemporary American problems. Thus, for example, Mr. St. Clair argues: “The pardon power is explicitly excluded for [United States] impeachment convictions. These extensive limits can only be understood as a reaction to and rejection of the English political impeachments.”<sup>37</sup> Mr. Berger, however, joins issue with Mr. St. Clair, on this point:

The exclusion proves exactly the contrary: The fact that a pardon *can not* save one convicted on impeachment shows an intention to *preserve* impeachments of whatever nature. The exception for pardons derived from English history and practice, when the pardon of the Earl of Danby by Charles II, after his impeachment, blew up a storm. As a result, the Act of Settlement fashioned a partial bar to such pardons; and a remark by George Nicholas in the Virginia Ratification Convention shows that the Founders were aware of this history: “Few ministers will ever run the risk of being impeached, when they know the King cannot protect them by a pardon.”<sup>38</sup>

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<sup>37</sup>ST. CLAIR, *supra* note 31, at 16.

<sup>38</sup>Berger, *supra* note 33, at 1151 n.221.

In fact both Mr. St. Clair and Mr. Berger appear a little wide of the mark on this point,<sup>39</sup> no doubt because of over-hasty delving into seventeenth-century English constitutional history imposed by the time imperatives of their comparative legal research. The English kings could always legally pardon *after* conviction on impeachment or adoption of a bill of attainder; however, for political reasons, they might choose not to do so. Charles I had promised Strafford, "upon the word of a King," that he would not let him suffer; but the public pressures against the King, after the House of Commons and the House of Lords had passed the bill of attainder, were so intense that Strafford, in a gesture that, even three centuries later, seems of extraordinary nobility and grace, wrote to Charles, releasing him from that promise. Charles, nevertheless, hesitated for two days to sign Strafford's death warrant. Only quite extraordinary pressures such as the threat by the Constable of the Tower that if the King continued to be obstinate and refused to sign the death warrant, he would personally kill his prisoner, Strafford, and threats reaching Whitehall that the lives of the Queen and even of the royal children were in danger, persuaded Charles to give way and to assent to what, eight years later on the day of his own execution, he regretted as an "unjust sentence."<sup>40</sup> Cardinal Richelieu, the King of France's chief minister, on hearing of the execution of Strafford, his arch political and diplomatic foe, decided that the English were mad—"they have killed their wisest man."<sup>41</sup> Charles I's failure to act to pardon Strafford *after* his attainder should not disguise the fact that royal pardon *after* attainder or impeachment was always perfectly legal and was in fact employed as late as 1715 when three of the Lords involved in the Stuart "Old Pretender's" unsuccessful, Jacobite restoration rebellion were granted royal pardons after they had been impeached, found guilty, and sentenced.<sup>42</sup>

The whole point in the English constitutional-historical debate as to the effect of a royal pardon on impeachment relates to the legal effect, if any, of a pardon granted *before* impeachment. In

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<sup>39</sup>See U.S. CONST. art. II, § 2, which states: "The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

<sup>40</sup>C. HIBBERT, CHARLES I 156-57, 279 (1968). See also S. GARDINER, HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES I TO THE OUTBREAK OF CIVIL WAR, 1603-42 (1883); R. BROWNING, LIFE OF STRAFFORD (1892); PAPERS RELATING TO THOMAS WENTWORTH (C. Firth ed. 1890).

<sup>41</sup>C. HIBBERT, *supra* note 40, at 157.

<sup>42</sup>F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 318, 480 (1909).

the Earl of Danby's case in 1679,<sup>43</sup> a *prior* royal pardon was pleaded in bar of an impeachment. The constitutional-legal question as to the effect of the pardon was raised but not decided, for Danby, though committed to the Tower, remained there untried until his release five years later in 1684. The question of law was, as Maitland observed,

a very new point, and on general principles I am far from being satisfied that the [House of] Commons had the best of the argument. The question would seem to be whether an impeachment was more analogous to an indictment, which could always be stopped by the King's pardon, or to an appeal of felony which being regarded as a private suit, was beyond the royal power.<sup>44</sup>

Maitland's own conclusion was that, as the law stood at the time of, and after, Danby's case, an impeachment could be prevented by a pardon.<sup>45</sup> The Act of Settlement of 1700 changed the law but, again, it changed the law as to the effect of pardons *before* or *during* impeachment.<sup>46</sup> The Act of Settlement left unchanged the royal power to pardon *after* conviction or impeachment.<sup>47</sup>

In reaching into seventeenth century English constitutional history, as a guide to the implications of the United States constitution's stipulation as to the President's "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment,"<sup>48</sup> Mr. St. Clair and Mr. Berger illustrate

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<sup>43</sup>*Id.* at 310; D. MEDLEY, ENGLISH CONSTITUTIONAL HISTORY 167 (4th ed. 1907); MEMOIRS RELATING TO THE IMPEACHMENT OF THOMAS EARL OF DANBY IN THE YEAR 1678 (1710).

<sup>44</sup>F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 318 (1909).

<sup>45</sup>*Id.* at 480; D. MEDLEY, ENGLISH CONSTITUTIONAL HISTORY 108 (4th ed. 1907).

<sup>46</sup>"That no pardon under the Great Seal of England be pleadable to an impeachment by the Commons in Parliament." The Act of Settlement, 12 & 13 Will. 3, c.3 (1700).

<sup>47</sup>Incidentally, Danby, after his release, untried, from the Tower in 1684, lived in political retirement for the last of Charles II's reign, but then took an active part in the conspiracy against Charles' younger brother and successor, James II, and thereby returned to power after the "Glorious Revolution" of 1688, under James' successors, William and Mary, surviving to face yet another impeachment in 1695 for alleged corruption in the affairs of the East India Company. The impeachment process was voted but never brought to trial. See generally A. BROWNING, THOMAS OSBORNE, EARL OF DANBY AND DUKE OF LEEDS (3 vols. 1944, 19— & 1951).

<sup>48</sup>U.S. CONST. art. II, § 2.

once again the pitfalls that can be inherent in the comparative approach to law when the recourse to the comparative method is based on partial or incomplete study of the foreign law system selected as a guide to one's own, and, in particular, when that study is limited to the abstract positive law categories, unaccompanied by any canvassing, in depth, of the underly complex of social interests from which the formal legal claims of the contending parties stemmed.<sup>49</sup> The lesson would seem to be that contemporary American legislative majorities must give their own contemporary meaning to the constitutional impeachment power, basing their interpretations on American precedents and on American constitutional traditions as they have evolved over the years since 1787. Just as the old mediaeval impeachment power had effectively lapsed into constitutional desuetude in English law by the opening of the nineteenth century, with the emergence of responsible, democratic government in England and with the informed English reaction against the wholly "political" impeachments operating under the guise of legal process, so the constitutional ambit of the American impeachment power today and, in particular, the question whether it can be construed broadly so as to permit "political" trials or whether, by contrast, it is to be construed narrowly and with proper regard to due process and the prosecution's discharge of a burden of legal proof, must be determined according to the received meaning today of a government operating under the rule of law, and in the light of the distinctively American principle that it is to be a "Government of Laws and not of Men." The notion that a temporary legislative majority or coalition in Congress could write its own, and no doubt temporary, "political" standards into the impeachment power—however much historical support it may seem to claim from long-abandoned English Parliamentary precedents of a pre-democratic era in English political development—would seem, in this regard, to be inconsonant with that principle.

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<sup>49</sup>See McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 61 YALE L.J. 915 (1952); Rozmaryn, *La règle de la légalité*, 10 REVUE INTERNATIONALE DE DROIT COMPARE 70 (1958); Yntema, *Comparative Legal Studies and the Mission of the American Law School*, 17 LA. L. REV. 538 (1957).

# NOTES

## THE PROPOSED NEW BANKRUPTCY ACT

### I. INTRODUCTION

On July 30, 1973, after more than two years of study, the Commission on the Bankruptcy Laws of the United States<sup>1</sup> transmitted to the President, the Congress, and the Chief Justice of the United States its report<sup>2</sup> evaluating the present system of bankruptcy administration in the United States and recommending the first comprehensive revision of the present national bankruptcy statute since the Chandler Act amendments of 1938.<sup>3</sup> Accompany-

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<sup>1</sup>The Commission on the Bankruptcy Laws of the United States [hereinafter referred to as the Commission] was created by joint resolution of Congress, effective June 24, 1970, to "study, analyze, evaluate, and recommend changes" in the Bankruptcy Act which would "reflect and adequately meet the demands of present technical, financial and commercial activities." Act of June 24, 1970, Pub. L. No. 91-354, 84 Stat. 468. The Commission was specifically directed to consider:

the basic philosophy of bankruptcy, the causes of bankruptcy, the possible alternatives to the present system of administering the Act, the applicability of advanced management techniques to achieve economies in the administration of the Act, and all other matters which the Commission shall deem relevant.

*Id.* The legislation establishing the Commission enumerated the circumstances which led to its creation: the increase in the number of bankruptcies in the United States by more than 1,000 percent annually in the last twenty years, the widespread feeling among referees in bankruptcy that administrative difficulties in the Act required substantial improvement, the impact of the vast expansion of credit on the operation of the Act, and the limited experience and understanding in the federal government and the commercial community in assessing the operation of the Act. *Id.*

<sup>2</sup>REP. OF THE COMM'N ON THE BANKRUPTCY LAWS OF THE UNITED STATES (1973) [hereinafter cited as COMM'N REP.].

<sup>3</sup>The Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, and its various additions and amendments were comprehensively revised by the Chandler Act of 1938, ch. 575, 52 Stat. 840. The Chandler Act has subsequently been revised and amended by more than sixty different congressional enactments and this conglomerate comprises the Bankruptcy Act as it exists today. 11 U.S.C. § 1 *et seq.* (1970). The Commission found that changes necessary to carry out its recommendations would involve a multitude of additional amendments to the Bankruptcy Act. Since further piecemeal revision by the Commission would not accomplish a much-needed streamlining and

ing the report was a formulation of the recommendations of the Commission in precise statutory language, in the form of a proposed "Bankruptcy Act of 1973," which has been submitted to Congress for enactment, and which, at this writing, is being considered by the Judiciary Committees of the House and Senate.<sup>4</sup> The Commission's recommendations for change may be classified into two general categories: "procedural" changes in the structure of, and the distribution of functions within, the bankruptcy system, and "substantive" changes in the law to be applied during the administration of a bankrupt estate.

The purpose of this Note is to review some of the substantive features of the proposed Bankruptcy Act which relate to consumer debtors.<sup>5</sup> Such a review necessarily involves a discussion of the present Bankruptcy Act and the difficulties with it which prompted the recommendations for change. It is hoped that such a review will be of value by increasing both the reader's understanding of the present Bankruptcy Act and his awareness of the revisions which Congress is considering at the present time.

## II. FUNCTIONS AND GOALS OF THE BANKRUPTCY PROCESS

A consideration of the functions and goals of the federal bankruptcy process provides an insight into the theory behind the specific recommendations of the Commission for changes in the substantive law of consumer bankruptcy. The existence of a pro-

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clarifying of the internal arrangement of the Act and would not account for the impact of the new Rules of Bankruptcy Procedure, effective October 1, 1973, the Commission determined to formulate an entirely new Bankruptcy Act. Press Release by Commission on the Bankruptcy Laws of the United States, July 30, 1973, in COMM'N REP.

In this Note, the specific language of the proposed new Bankruptcy Act will not be considered. The Commission recognized that it was "impossible within the time and budgetary limitations to which [it was] subject to produce a proposed statute which may not need some refinement and clarification." *Id.* Thus, it seems unproductive to criticize specific statutory language which is not yet and may never be law; it seems more productive to approach the theory of the proposed new Bankruptcy Act and to discuss the recommendations in general terms.

<sup>4</sup>S. 2565, 93d Cong., 1st Sess. (1973); H.R. 10792, 93d Cong. 1st Sess. (1973).

<sup>5</sup>For the purposes of this Note, the term "consumer debtor" encompasses nonbusiness individual debtors who do not have the option of liquidation and termination of their activity in the economic community, but instead must continue to live and consume to provide food, clothing, shelter, and health care for themselves and their families after obtaining relief under the Bankruptcy Act.

cedure which permits the nonperformance of contractual obligations seems dangerous in an economy which thrives on credit transactions and anomalous in a society which places primary importance, both morally and legally, upon the performance of contractual commitments. Nonetheless, the bankruptcy process is supportive of and essential to the success of a credit-based economy.<sup>6</sup>

The Commission Report identifies the two primary functions of the bankruptcy system. First, the bankruptcy process serves to "continue the law-based orderliness of the open credit economy in the event of a debtor's inability or unwillingness generally to pay his debts."<sup>7</sup> Both debtors and creditors need rules and procedures which define the legal consequences of their future conduct to guide them in their day-to-day activities within the credit community.<sup>8</sup> It is important that there be uniform national standards which determine creditors' rights in the wealth of debtors, wherever and in whatever form this wealth exists, and procedures which give effect to these standards and make it possible for creditors to realize on their claims.<sup>9</sup> It is important that debtors have "a sanctuary from the jungle of creditors' pursuit of their individualistic collection efforts,"<sup>10</sup> either by way of a stay of these collection efforts or by way of an authoritative discharge.

The bankruptcy process further serves the credit economy by providing a meaningful "fresh start" to debtors too burdened to enter new credit transactions, thereby rehabilitating them for continued and more productive future participation in the credit community.<sup>11</sup> It is this latter function which is of special significance to consumer debtors because, while a "fresh start" policy has become independently established in the commercial world by the

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<sup>6</sup>COMM'N REP. 84. The Commission uses the term "open credit economy" to refer to the role of private credit generally in the economy of the United States. The open credit economy is a "complex of highly organized processes," *id.* at 81, and although it is not entirely "open", it is characterized as such by the Commission in contrast with the command credit economies of communistic and socialistic countries. *Id.* at 82. The bankruptcy process has its principal impact on the open credit economy since most of the debts scheduled in bankruptcy arise from transactions between debtor and creditor participants; other debts, such as family support obligations, tort liabilities, taxes, and fines, are minimally affected because often they are nondischargeable. *Id.* at 83.

<sup>7</sup>*Id.* at 84.

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

availability of limited liability and easy dissolution of corporate entities, a meaningful "fresh start" is only available to consumers through bankruptcy legislation.<sup>12</sup>

While serving and supporting the credit economy is both a function and a goal of the bankruptcy process, other specific goals greatly influence the establishment of the policies of the bankruptcy process. The Commission Report enumerates the significant internal specialized goals. First, the bankruptcy process should be easily accessible to both debtors and creditors.<sup>13</sup> The bankruptcy process should encourage debtors and creditors to participate in informal plans based on private agreement since, when debtors and creditors can agree, a process "less formal, less expensive, and less stigmatized than a case under the Bankruptcy Act is more appropriate."<sup>14</sup> However, when a bankruptcy proceeding is in order, the bankruptcy process should encourage timely resort to relief so as to cut short the dissipation of the debtor's assets and the accumulation of more debts.<sup>15</sup> The process should be "intellectually accessible" by simplification and clarification of the substantive law, procedural rules, and administrative practices, the process should be "physically accessible" by the establishment of local offices and contact points, and the process should be "economically accessible" by eliminating the need for expensive legal representation to fill out forms for simple cases.<sup>16</sup> Second, the bankruptcy process should provide fair and equitable treatment of creditors' claims.<sup>17</sup> Since creditors' rights laws outside bankruptcy are neither consistent nor comprehensive,<sup>18</sup> internal standards of two types are needed:

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<sup>12</sup>*Id.* The consumer may attempt to move to a new state to avoid his creditors, but obviously the relief afforded by such self-help methods cannot be deemed meaningful.

<sup>13</sup>The premise of the Commission is that the honest debtor should be benefited by meaningful relief and that the dishonest debtor should not be aided. Thus, easy accessibility should not be taken to mean that relief via the bankruptcy process should be so permissive as to become a popular means of avoiding obligations. Bankruptcy relief should remain a serious alternative, not to be taken lightly and not to be planned for or used as a means of defrauding creditors.

<sup>14</sup>COMM'N REP. 57.

<sup>15</sup>*Id.* at 87-88.

<sup>16</sup>*Id.* at 88.

<sup>17</sup>*Id.*

<sup>18</sup>*E.g.*, UNIFORM COMMERCIAL CODE § 2-702 takes into account the insolvency of the debtor, while other rules, such as the priority rules of Part 3 of Article 9 of the Code, do not. Methods of enforcing creditors' rights vary depending upon the class of the lien interest, for example, whether the

"distributive" standards that consider the legal status of the creditors' claims and "allocative" standards that consider the social and economic consequences of the allocation of the burden of loss.<sup>19</sup> Third, the process must provide fully for the rehabilitation of debtors by providing relief that is "flexible, comprehensive, lasting, and timely."<sup>20</sup> The process should assist the debtor in making an informed choice of the relief best-suited to his domestic and economic circumstances, should preserve the property of debtor which is necessary for the maintenance of his household, and should preclude the denial, encroachment, or termination of discharge benefits.<sup>21</sup> Fourth, the process should administer cases quickly, impartially, economically, uniformly, and flexibly,<sup>22</sup> and should effectively deter and sanction dishonest conduct in its use.<sup>23</sup> The conclusion of the Commission is that the present Bankruptcy Act does not effectively promote the realization of these goals of the bankruptcy process. The recommendations of the Commission for changes in the substantive law of bankruptcy are made with these goals in mind.

### III. PROCEDURAL RECOMMENDATIONS

Many of the proposed revisions to the substantive law of consumer bankruptcy are integrally related to the proposed procedural revisions. Although this Note does not pretend to discuss these procedural recommendations in any detail, a brief mention of them at the outset is essential to a full understanding of the proposed substantive changes.

Under the present Bankruptcy Act, the administrative and judicial functions of the bankruptcy system are performed by the federal district courts, their appointees, and assistants.<sup>24</sup> A great part of the work of these judicial tribunals is administrative and involves the handling of papers for thousands of cases in which

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lien is judicial, consensual, or statutory. COMM'N REP. 89. The order of priority among liens of different classes is not completely resolved because of competing and conflicting interests. *Id.*

<sup>19</sup>COMM'N REP. 89.

<sup>20</sup>*Id.* at 91.

<sup>21</sup>*Id.* at 91-92.

<sup>22</sup>*Id.* at 93.

<sup>23</sup>*Id.* at 94. Sanctions upon dishonest conduct in the use of the bankruptcy process are found in 18 U.S.C. § 151 *et seq.* (1970).

<sup>24</sup>Bankruptcy Act, 11 U.S.C. § 2 (1970) [hereinafter referred to as the Act; hereinafter cited as Bankruptcy Act and cited to sections in the

no contest ever arises.<sup>25</sup> Not only is a disproportionate amount of judicial time, energy, and money committed to the performance of administrative duties for which a judicial tribunal is not equipped,<sup>26</sup> but also, when a judicial resolution is required, the judge's prior participation in the administrative aspects of the bankruptcy proceeding may tend "to impair the litigant's confidence in the impartiality of the tribunal's decision."<sup>27</sup>

To effect increased efficiency, economy, and impartiality of case handling, the Commission is in favor of a comprehensive restructuring of the bankruptcy system.<sup>28</sup> The Commission recommends the division of the administrative and judicial functions within the bankruptcy system by the creation of two independent subsystems. The Commission proposes that the judicial duties be performed by new bankruptcy courts, separate and distinct from, but with powers parallel to those of, the federal district courts.<sup>29</sup> The present bankruptcy courts have limited exclusive jurisdiction over controversies which involve an estate undergoing admin-

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Bankruptcy Act and not to sections in the United States Code]. Referees in bankruptcy are assigned most of the administrative and judicial functions.

<sup>25</sup>COMM'N REP. 17.

<sup>26</sup>*Id.* at 97-98. For example, bankruptcy courts may become involved in the supervision of businesses and wage earner plans.

<sup>27</sup>*Id.* at 17-18. The litigants may believe that the trustee has a friendly forum in the bankruptcy court. *Id.* at 102. The litigants may also believe that on appeal, the district judge, typically located in the same courthouse as the referee, will be "unlikely to reverse an appointee of the reviewing court." *Id.* at 107. Whether these beliefs are justified or not is not pertinent; if such beliefs do, in fact, tend to undermine confidence in the bankruptcy process by compromising the apparent objectivity of the judicial functionaries, then the process loses some of its effectiveness.

<sup>28</sup>*See id.* at 97-169 for a discussion of all reasons for the recommended restructuring; *cf. id.* at 321-23 for the comments of a dissenting member of the Commission. *See also* Cyr, *The Abandonment of Judicial Administration of Insolvency Proceedings: A Commitment to Consumer Disservice*, 78 COM. L.J. 37 (1973); Lee, *Possible Alternatives to the Present System of Bankruptcy Administration*, 45 AM. BANKR. L.J. 149 (1971).

<sup>29</sup>*See* COMM'N REP. 97-108. The judicial districts of the present bankruptcy courts coincide with federal judicial districts. Bankruptcy Act § 37. The Commission proposes local territorial bankruptcy districts, not necessarily coinciding with federal districts, but to be determined by the Judicial Conference. COMM'N REP. 18. Referees in bankruptcy, under the present Bankruptcy Act, do not have the full powers of the federal district judges; they do not have the power to issue restraining orders or the power to conduct jury trials, and until the new Rules of Bankruptcy Procedure became effective in October 1973, they had no power to punish for contempt. *See* Bankruptcy Act § 41; R. BANKR. P. 920. The proposed Act would give the new bankruptcy judges the full powers of federal district judges. COMM'N REP. 19.

istration under the Bankruptcy Act: litigation of some controversies *must* be instituted in a nonbankruptcy court although the decision may seriously affect rights of debtors and creditors in a bankruptcy case;<sup>30</sup> litigation of certain other controversies *may* be commenced in a nonbankruptcy court at the option of the plaintiff.<sup>31</sup> The proposed new bankruptcy courts would have exclusive jurisdiction over *all* controversies arising out of proceedings under the Act<sup>32</sup> and would have no administrative functions absent the existence of a litigable controversy.<sup>33</sup>

The Commission proposes that the administrative duties be performed by a new federal agency to be created in the executive branch of the government.<sup>34</sup> The Administrator of this proposed agency would be authorized to maintain a staff of trained civil servants and, in addition, to employ attorneys, accountants, appraisers, auctioneers, consultants, and business advisors on a temporary basis.<sup>35</sup> The Administrator would be authorized to handle

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<sup>30</sup>The bankruptcy court has jurisdiction to determine all disputes affecting property in the custody of the court, to determine all issues arising out of petitions which initiate bankruptcy proceedings, and to determine controversies arising in the course of the administration of an estate in which the adverse parties either waive objections to jurisdiction or fail to assert objections. COMM'N REP. 100. In some other instances, the Bankruptcy Act explicitly confers jurisdiction on the bankruptcy court. *E.g.*, Bankruptcy Act §§ 2a(12), 2a(21), 17c, 50n, 571, 60d, 67a, 69d, 70a(8). Litigation of controversies which do not fall in the above categories *must* be initiated in a nonbankruptcy court. COMM'N REP. 100.

Some provisions seem to give the bankruptcy court and state courts concurrent jurisdiction over plenary proceedings arising out of these sections. *E.g.*, Bankruptcy Act §§ 60b, 67d, 70e. However, the trustee, under these provisions, must bring his action in a federal district court or a state court, unless there are independent grounds for jurisdiction in the bankruptcy court. 2 COLLIER, BANKRUPTCY, ¶ 23.15, at 603 (14th ed. 1973).

<sup>31</sup>Trustees are suable "without leave of the court appointing them." 28 U.S.C. § 959 (1970). See 2 COLLIER, BANKRUPTCY, ¶¶ 23.15, 23.16, 23.19, 23.20 (14th ed. 1973).

<sup>32</sup>Jurisdiction of railroad reorganizations would, however, remain in the federal district courts. COMM'N REP. 97.

<sup>33</sup>Although the proposals of the Commission would result in a decrease in the number of bankruptcy judges, the intent is to increase the stature of those remaining. Broadening the court's jurisdiction would help to eliminate the harmful delay which may occur when procedures and dockets of non-bankruptcy courts are encountered, the extra expense to the bankrupt estate when forced to litigate outside the bankruptcy court, and, most important, the frequent and prolonged litigation of the question of jurisdiction. *Id.* at 101.

<sup>34</sup>See *id.* at 115-29.

<sup>35</sup>*Id.* at 129.

almost all matters in proceedings under the Act except those aspects of a case which require a judicial determination.<sup>36</sup> Functions presently performed by bankruptcy courts, which supposedly could be more efficiently and economically handled by an agency with modern computer facilities and a well-trained professional staff, include: the receipt and processing of voluntary petitions, schedules, and statements of affairs, the notification of creditors of significant events in cases being administered, the allowance and disallowance of debtors' exemptions and creditors' claims, the granting of discharges when no objections are filed, the determination of priorities in the distribution of proceeds to creditors, and the ordering of payments to creditors.<sup>37</sup> The Administrator would also be authorized, and mandated, to perform a function presently undelegated within the bankruptcy system, that is, to provide free counseling to individual debtors with regular income regarding the form of relief most appropriate in their particular circumstances.<sup>38</sup> This proposed counseling service is of great significance to the consumer debtor seeking rehabilitation via the federal bankruptcy system.

#### IV. CONSUMER CASES: VOLUNTARY

##### A. *Selection of the Form of Relief*

The present Bankruptcy Act provides that any individual is entitled to the benefits of the Act as a voluntary bankrupt.<sup>39</sup> The "benefits of the Act" insofar as the consumer debtor is concerned consist of two distinct forms of relief. The debtor may seek a discharge of his debts under Chapters I to VII in which case his non-exempt assets are liquidated and the proceeds applied in full satisfaction of the provable and nonexcepted claims of his creditors. Alternatively, the debtor may seek to effect a wage earner plan under Chapter XIII in which case he proposes to pay his debts in full or in part out of his future earnings.

The present bankruptcy system provides no assistance to the debtor to help him decide which of these alternatives is best-suited

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<sup>36</sup>The Administrator would not handle any aspects of railroad reorganization cases. *Id.* at 21.

<sup>37</sup>*Id.* at 133. The Administrator would handle not only the administrative functions of the referees, but also of trustees in liquidation cases (unless the creditors elect an independent trustee), of trustees in wage earner plans, and of the SEC in reorganization proceedings. *Id.* at 132-33.

<sup>38</sup>*Id.* at 133. See Lee, *The Counseling of Debtors in Bankruptcy Proceedings*, 45 AM. BANKR. L.J. 387 (1972); COMM'N REP. 91 (functions to be performed by counseling service).

<sup>39</sup>Bankruptcy Act § 4a.

to his economic predicament. If the debtor does not obtain private counsel, he will have no practical conception of what lies ahead in the bankruptcy process. If he does obtain private counsel, he must be prepared to pay what are often inordinately high attorneys' fees in relation to the quality of counsel provided.<sup>40</sup>

The Commission proposes that every individual petitioner with regular income file with the Administrator an "open-ended" petition.<sup>41</sup> The petition would be referred to a counselor<sup>42</sup> employed by the Administrator. The selection of the type of relief desired by the petitioner would be postponed until he had received advice as to the advantages, disadvantages, and feasibility of the successful completion of a wage earner plan, and as to his eligibility for, and the probable effects of, a discharge in straight bankruptcy.

The interests of both debtors and creditors would be served by his counseling procedure. A debtor, by having the opportunity to make an informed choice of the particular mode of relief best-suited to the "continuation of his household as a social and economic unit,"<sup>43</sup> could be assured of a chance for a lasting and meaningful rehabilitation. Creditors, likewise, could be more secure in the knowledge that the relief chosen is probably both fair and feasible; they would also be assured, in most cases, that the assets of the bankrupt in which they might be able to share were not being siphoned "off the top" to the debtor's attorney.

### *B. Straight Bankruptcy Discharge*

A voluntary petition for discharge under Chapters I to VII of the present Bankruptcy Act must be filed with the bankruptcy court.<sup>44</sup> With the petition, the debtor must file a detailed schedule of his property, showing the amount, kind, location, and money value, a list of all his creditors, including those who assert contingent, unliquidated, or disputed claims, showing their residences, the amount due or claimed by each of them, the consideration received, and the security held by each of them, and a claim for those exemptions to which the debtor considers himself entitled.<sup>45</sup>

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<sup>40</sup>COMM'N REP. 58.

<sup>41</sup>*Id.* at 133.

<sup>42</sup>The Commission does not contemplate that the counselors be attorneys, but only that they be trained as professional bankruptcy counselors. *Id.* at 134.

<sup>43</sup>*Id.* at 91.

<sup>44</sup>Bankruptcy Act § 59.

<sup>45</sup>*Id.* § 7a(8).

The filing of a voluntary petition operates automatically as an adjudication, that is, as a determination that the debtor is a bankrupt.<sup>46</sup> An adjudication of bankruptcy serves as an application for discharge.<sup>47</sup> Upon receipt of an application for discharge, the court must notify the creditors of the bankrupt that the application is pending,<sup>48</sup> set a time for filing objections to discharge and for filing applications for a judicial determination that certain debts are not dischargeable,<sup>49</sup> and set a time for the first meeting of creditors.<sup>50</sup>

Upon the expiration of the time set for the filing of objections, if no objections have been filed and if the filing fees required by the Act have been paid in full, a discharge will be granted.<sup>51</sup> If objections have been filed, the court must hear evidence in opposition to the discharge<sup>52</sup> and will grant the discharge only if satisfied that the bankrupt has not committed any one of certain specified acts which bar such relief.<sup>53</sup>

With three exceptions, the Commission recommends substantial retention of the provisions of the present Act which enumerate the acts which bar a bankrupt's discharge. The present Bankruptcy Act limits the availability of successive discharges by providing that the bankrupt's discharge is barred by his having obtained relief by way of a discharge or by way of the confirmation of a wage earner plan for a composition<sup>54</sup> within six years of

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<sup>46</sup>*Id.* § 18f.

<sup>47</sup>*Id.* § 14.

<sup>48</sup>*Id.*

<sup>49</sup>*Id.* For a discussion of the judicial determination of dischargeability, see text accompanying notes 78-86 *infra*.

<sup>50</sup>Bankruptcy Act § 57.

<sup>51</sup>*Id.* § 14b(2).

<sup>52</sup>The evidence must be such that will give the bankrupt and the objecting parties a "reasonable opportunity to be heard." *Id.*

<sup>53</sup>*Id.* § 14c. Acts which bar discharge include: committing an offense punishable by imprisonment under 18 U.S.C. § 152 (1970), destroying or mutilating records from which the debtor's financial condition and business transactions might be ascertained, making a false written financial statement to obtain credit while engaged in a business as a sole proprietor, partnership, or corporate executive, concealing property with intent to defraud creditors, obtaining relief under the Bankruptcy Act within the preceding six years, refusing to obey a lawful order of the bankruptcy court, failing to explain satisfactorily any deficiencies of assets, or failing to pay the filing fee required by the Act.

<sup>54</sup>A "composition" is a plan in which the debtor proposes to pay only a portion of the total amount of all the debts with which he deals in his wage

the filing of the pending petition.<sup>55</sup> The Commission contends that, while a time bar is essential to prevent abuse of the bankruptcy system by habitual bankrupts, the bar should not be so absolute as to frustrate the rehabilitative goals of the Bankruptcy Act.<sup>56</sup> The Commission recommends that the confirmation of a wage earner plan for a composition should not bar subsequent discharge,<sup>57</sup> that the arbitrary six-year period be reduced to a five-year period,<sup>58</sup> and that, even within this five-year period, a discharge might be granted if the court is satisfied that "the inability of the debtor to pay his debts is substantially the result of causes not reasonably within his control and if payment of them . . . will impose an undue hardship on the debtor and his dependents."<sup>59</sup>

Perhaps the greatest inconsistency of the present Bankruptcy Act is that a bankrupt may not obtain a discharge until he has paid in full the filing fees required by the Act.<sup>60</sup> In *United States v. Kras*,<sup>61</sup> the Supreme Court upheld the constitutionality of the Act's preclusion of the filing of an in forma pauperis petition in bankruptcy.<sup>62</sup> The Commission recommends that failure to pay the filing fee be eliminated as a bar to discharge and that indigent debtors be authorized to file in forma pauperis petitions.<sup>63</sup> Although, as the Commission points out, one who is unable to pay a rather minimal filing fee typically "should not be concerned by threats of enforced collection by creditors, it is anomalous that the benefits of the Act should be denied to one because he is so bankrupt that he lacks even the fee."<sup>64</sup>

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earner plan; an "extension" is a plan in which the debtor proposes to pay all the debts enumerated in the plan over a specified and extended period of time; a combination "composition and extension" is a plan in which the debtor proposes to pay a portion of his debts over an extended period of time. The confirmation of any plan involving a composition of the debtor's obligations is a bar to subsequent relief under the present Act. Only the confirmation of a plan of extension alone does not bar subsequent relief.

<sup>55</sup>Bankruptcy Act § 14c(5).

<sup>56</sup>COMM'N REP. 186.

<sup>57</sup>*Id.* at 24.

<sup>58</sup>*Id.*

<sup>59</sup>*Id.* at 186. (This is the language of § 4-505(a) of the proposed Act.)

<sup>60</sup>Bankruptcy Act §§ 14b(2), 14c(8).

<sup>61</sup>409 U.S. 434 (1973).

<sup>62</sup>*Id.* at 446-48.

<sup>63</sup>COMM'N REP. 23.

<sup>64</sup>*Id.* at 21.

The present Bankruptcy Act bars the discharge of an individual engaged in business if he has obtained money or property on credit for the business by making a materially false written statement of his financial condition or the financial condition of his partnership or corporation.<sup>65</sup> The Commission recommends that this kind of fraud be dealt with by excepting the particular debt from the effects of the discharge, rather than by giving the defrauded creditor a life or death power over the debtor's discharge.<sup>66</sup>

If it is determined that the discharge of the bankrupt is not barred, the debtor and his creditors must then be concerned with the effects of the discharge. The present Bankruptcy Act provides that a discharge releases the bankrupt from all debts which are "provable"<sup>67</sup> in bankruptcy, except those debts which are "excepted"<sup>68</sup> by the Act. Property of the debtor which is not "exempt"<sup>69</sup> constitutes the "estate"<sup>70</sup> of the debtor in which those creditors whose claims are "proved and allowed"<sup>71</sup> within six months of the first date set for the first meeting of creditors are entitled to share. Certain claims of creditors are given "priority"<sup>72</sup> and are paid in full before any of the other creditors may share equally in the estate. The Commission recommends the abolition of the concept of "provable" debts and the consolidation of the two tests of "provability" and "allowability" into the single simplified and clarified concept of "allowability."<sup>73</sup> In the proposed Act, all legal obligations of the debtor would be dischargeable, unless specifically excepted, and all claims of creditors, unless specifically

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<sup>65</sup>Bankruptcy Act § 14c(3)

<sup>66</sup>COMM'N REP. 185.

<sup>67</sup>Bankruptcy Act § 63 defines the types of debts which are provable. An order of discharge must declare void any previous or subsequent judgment in any other court as a determination of the liability of the bankrupt as to discharged debts and must enjoin creditors whose debts have been discharged from instituting or continuing any action to collect such discharged debts. *Id.* § 14f.

<sup>68</sup>*Id.* § 64.

<sup>69</sup>*Id.* § 6.

<sup>70</sup>*Id.* § 70.

<sup>71</sup>*Id.* § 57. Proof of a claim consists of establishing the validity and the amount of the claim.

<sup>72</sup>*Id.* § 64.

<sup>73</sup>COMM'N REP. 33. Under the present Act, the creditor must consider various sections and various tests to determine if his claim is provable (§ 63), when it is proved (§ 57a), if proved, when it will be allowed (§ 57d), and if proved and allowed, if it will be excepted (§ 64).

disallowed, would be cognizable for potential participation in the bankrupt's assets.<sup>74</sup>

The proposed test of allowability is most significant because of its simplicity and clarity. However, one specific innovation in the allowability section of the proposed Act is of particular importance to consumer debtors and would be more significant from their point of view than the consolidation of the allowability test. The Commission recommends that "unconscionable consumer claims be subject to disallowance under standards set forth in the Act that are based on ones adopted or proposed for consumer protective legislation."<sup>75</sup> Thus, creditors guilty of "overreaching sales or credit practices"<sup>76</sup> would have no right to share in the estate of the bankrupt and would have no standing to object to the bankrupt's discharge.

The present Bankruptcy Act enumerates certain types of obligations which are "excepted" and not released by the granting of a discharge.<sup>77</sup> The Commission recommends the elimination of certain exceptions which frustrate the debtor's chances of rehabilitation and the addition of certain others, without which abuse of the discharge provisions is possible. The present Bankruptcy Act provides that a debt for which credit was extended in reliance on the false financial statement of the debtor is not dischargeable if the creditor seeks a timely determination of the dischargeability issue before the bankruptcy court.<sup>78</sup> Prior to 1971, a creditor who had taken a financial statement listing the debts of the bankrupt at the time credit was extended could sue the debtor, even after his discharge, upon the debt arising out of the extension of credit if the debtor had made less than a complete disclosure of his finan-

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<sup>74</sup>COMM'N REP. 225.

<sup>75</sup>*Id.*

<sup>76</sup>*Id.*

<sup>77</sup>Debts which are not affected by a discharge in bankruptcy include: taxes legally due and owing within three years preceding bankruptcy or those for which no return or a fraudulent return was filed, liabilities for obtaining credit or false pretenses, debts which were known to the bankrupt but which were not scheduled in time for proof and allowance unless the creditor knew of the pendency of the proceedings, debts created by the fraud of the bankrupt as a fiduciary, liabilities for wages and commissions which are entitled to priority under § 64a, money due an employee retained by an employer to secure the faithful performance by the employee of his employment contract, money due for alimony or maintenance and support of a wife or child, and liabilities for wilful injuries to person or property. Bankruptcy Act § 17a.

<sup>78</sup>*Id.* § 17a(2).

cial position.<sup>79</sup> Congress was informed that in most cases the false financial statement was not relied on by the creditor, but taken merely to be used to obtain a reaffirmation after bankruptcy<sup>80</sup> or to obtain a default judgment against a debtor unwilling to affirm.<sup>81</sup> In an attempt to combat this abuse of the bankruptcy system, Congress in 1971 amended the Bankruptcy Act to require that a creditor wishing to rely on the false financial statement exception seek a timely determination in the bankruptcy proceeding.<sup>82</sup>

The Commission recommends that reliance upon the false financial statement of a debtor be eliminated as an exception to discharge.<sup>83</sup> The Commission's study revealed that the 1971 dischargeability amendments have not attained their objective of combatting abuse of the bankruptcy system. Creditors have still been able to make advantageous use of the false financial statement by threatening to litigate the question of dischargeability and by accepting a reaffirmation of the debt in settlement.<sup>84</sup> The Commission determined that the exception has "generated a substantial amount of litigation and has partially frustrated the 'fresh start' goal of the discharge,"<sup>85</sup> and that the "abuses and harmful effects far outweigh the benefit to creditors."<sup>86</sup>

The present Bankruptcy Act provides that claims for taxes which became "legally due and owing . . . within three years preceding bankruptcy," and those for any period in which a false return or no return was filed, are excepted from discharge.<sup>87</sup> In furtherance of the "fresh start" goal, the Commission recommends

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<sup>79</sup>COMM'N REP. 22. Such creditors relied upon a provision excepting the debt from discharge.

<sup>80</sup>See text accompanying notes 131-33 *infra*.

<sup>81</sup>COMM'N REP. 23.

<sup>82</sup>*Id.*

<sup>83</sup>*Id.* at 24.

<sup>84</sup>*Id.* at 23. See Countryman, *The New Dischargeability Law*, 45 AM. BANKR. L.J. 1 (1971); Schuchman, *Impact Analysis of the 1970 Bankruptcy Discharge Amendments*, 51 N.C.L. REV. 233 (1972); 69 MICH. L. REV. 1347 (1971). See also Herzog, *The Case for Jury Trials on the Issue of Dischargeability*, 46 AM. BANKR. L.J. 235 (1973); Countryman, *Jury Trials on Dischargeability: A Reply to Referee Herzog*, 46 AM. BANKR. L.J. 305 (1973).

<sup>85</sup>COMM'N REP. 186.

<sup>86</sup>*Id.*

<sup>87</sup>Bankruptcy Act § 17a(1). Prior to 1966, no tax claims were dischargeable.

that the time period be reduced to one year.<sup>88</sup> The loss of revenue to the Treasury Department as a result of this reduction of time would be minimal, the return to creditors could be significantly increased, and the burden to the debtor of the nondischarged claim would be substantially alleviated.<sup>89</sup>

In an attempt to curtail recognized abuses by debtors of the bankruptcy discharge, the commission recommends the extension of the range of excepted debts in two respects. To discourage pre-bankruptcy shopping sprees, the Commission proposes that debts incurred within ninety days of the petition, with no intention of repayment, not be dischargeable.<sup>90</sup> To prevent abuse of educational loan programs by those who make no attempt to repay and instead file bankruptcy the day after graduation, the Commission recommends that, unless the debtor can show hardship, educational loans should not be dischargeable until five years after the due date of the first payment.<sup>91</sup>

The present Bankruptcy Act provides that the creditors of the bankrupt, at the first meeting of creditors after the adjudication, shall appoint a trustee of the estate of the bankrupt.<sup>92</sup> If the creditors do not appoint a trustee, the court may do so.<sup>93</sup> The trustee, as of date the petition is filed, is vested with the title of the bankrupt to all types of property enumerated in the Act, unless the property is held to be exempt.<sup>94</sup> The trustee, under the direction of the court, is bound to "collect and reduce to money" the property of the estate for which he is trustee.<sup>95</sup>

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<sup>88</sup>COMM'N REP. 186. A tax claim for which either no return or a fraudulent return was filed would also be nondischargeable.

<sup>89</sup>*Id.* at 186, 228.

<sup>90</sup>*Id.* at 186-87.

<sup>91</sup>*Id.* at 187.

<sup>92</sup>Bankruptcy Act § 44a. If there are no assets to be administered, the requirement of a trustee is dispensed with.

<sup>93</sup>*Id.*

<sup>94</sup>*Id.* § 70a. Kinds of property which are considered to be property of the estate of the bankrupt include: documents relating to the debtor's property, interests in patents, copyrights and trademarks, and in applications therefor, powers which the bankrupt might have exercised for his own benefit, property transferred by the debtor in fraud of his creditors, property which could have been transferred or levied upon prior to the filing of the petition, rights of action upon contracts or for the unlawful taking of property, contingent remainders, executory interests, etc., and property held by an assignee for the benefit of creditors appointed by an assignment which was preferential to some creditors.

<sup>95</sup>*Id.* § 47a(1).

The present Bankruptcy Act refers to state law to determine what is property of the bankrupt and whether that property is voluntarily or involuntarily transferable.<sup>96</sup> This double reference to state law not only produces excessive litigation, in which federal tribunals are called upon to decide questions of state law, but also often works unfairly and in contravention of the goals of the federal bankruptcy process.<sup>97</sup> The return to creditors in a bankruptcy proceeding may depend upon the debtor's residence and that state's laws with respect to creditors' rights in property held jointly, as tenants of the entireties, as community property, or subject to spendthrift restraints, dower, curtesy, or other statutory interests.<sup>98</sup> The nonuniformity of state laws of transferability results in nonuniformity in the operation of the Act and frustrates the function of the Act to provide standard rules and procedures upon which debtors and creditors anywhere and at any time may rely.

The Commission proposes that the Bankruptcy Act retain the first reference to state law to determine what is property of the debtor, given that the alternative would be to codify a federal law of property solely for the purpose of the Bankruptcy Act.<sup>99</sup> The Commission recommends, however, that once it is determined by state law what is property of the debtor, the Bankruptcy Act should abandon the state law transferability test and provide uniform rules to determine the availability of the debtor's property to his creditors.<sup>100</sup> The Commission would provide that the undivided interest of a spouse who is a debtor in a bankruptcy case be made available to creditors by authorizing the trustee of either spouse to sell property held jointly and to reimburse the spouse who is not a bankrupt out of the net proceeds of the sale.<sup>101</sup> The

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<sup>96</sup>*Id.* § 70a(5). Property of the estate of the bankrupt is defined to include:

property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered . . . .

*Id.*

<sup>97</sup>COMM'N REP. 206. See Countryman, *The Use of State Law in Bankruptcy Cases*, 47 N.Y.U.L. REV. 407, 631 (1972).

<sup>98</sup>See Bienenfeld, *Creditors v. Tenancies by the Entirety*, 1 WAYNE L. REV. 105 (1955); Huber, *Creditors' Rights in Tenancies by the Entireties*, 1 B.C. IND. & COM. REV. 201 (1959).

<sup>99</sup>COMM'N REP. 207.

<sup>100</sup>*Id.*

<sup>101</sup>*Id.* at 207-08.

Commission would include community property of the debtor in his estate only if it is "generally liable for the debtor's postnuptial contractual debts."<sup>102</sup> The Commission would recommend that spendthrift restraints be unenforceable in a bankruptcy proceeding to the extent that the value of the beneficial interest is in excess of the "reasonable support needs of the debtor and his dependents."<sup>103</sup>

The provisions of the proposed Act would bring almost all of the property owned by the debtor into his estate, including future interests such as contingent remainders, executory interests, rights of re-entry, and powers of termination.<sup>104</sup> The Commission recognizes that such interests may have only speculative value and recommends that if the realizable value is "only nominal or disproportionate as compared to the potential value to the debtor, such interests are not to be considered property of the estate."<sup>105</sup> The Commission would also invalidate dower, curtesy, and similar statutory interests insofar as the Bankruptcy Act is concerned.<sup>106</sup>

The exemption provisions of bankruptcy legislation are as important as the discharge provisions to the debtor seeking rehabilitation and a meaningful "fresh start." A discharge will be of little value to an individual bankrupt if he is left destitute and without a basis for rehabilitation. The present Bankruptcy Act recognizes the need for exemptions, but relies upon state law and federal law other than the Bankruptcy Act to determine what property of the debtor is exempt.<sup>107</sup> The problems of nonuniformity of state law and the consequent frustration of the goals of federal bankruptcy legislation recur.

The Commission recommends that the Bankruptcy Act prescribe the exemptions available to debtors and supercede other state and federal laws.<sup>108</sup> The Commission would allow as exempt the types of property that have traditionally been allowed as ex-

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<sup>102</sup>*Id.* at 208-09. This would preserve the result now reached in most community property states, except Arizona and Washington.

<sup>103</sup>*Id.* at 209.

<sup>104</sup>*Id.* The present Act includes such interests if they are alienable under state law. Bankruptcy Act § 70a(7).

<sup>105</sup>COMM'N REP. 209.

<sup>106</sup>*Id.* at 207. This would be an explicit exception to the proposed all-inclusive rule.

<sup>107</sup>Bankruptcy Act § 6.

<sup>108</sup>COMM'N REP. 181.

empt under state law.<sup>109</sup> The Commission would include a homestead exemption of up to \$5000 of equity in property which the debtor, his spouse, or his dependents owned and used as a home at the time of the filing of the discharge petition.<sup>110</sup> In addition to the homestead, the Commission would exempt, up to specified maximum amounts, such property as livestock, jewelry, clothing, household furnishings, tools of the debtor's trade, motor vehicles, a burial plot, disability benefits, health aids, and rights in certain retirement plans.<sup>111</sup>

The present Bankruptcy Act requires that the debtor file with his voluntary petition a list of those exemptions to which he claims he is entitled.<sup>112</sup> The trustee of the bankrupt's estate may "set apart the bankrupt's exemptions allowed by law, [only] if claimed."<sup>113</sup> To prevent the inadvertent loss of exemptions to the debtor who fails to claim them, the Commission proposes that the Administrator be authorized to allow exemptions in the absence of any action on the part of the debtor.<sup>114</sup>

The deference of the present Bankruptcy Act to state law to determine exemptions may result in the loss of exemptions to the debtor who has waived his rights to them and who resides in a state which enforces such waivers.<sup>115</sup> The Commission believes that the federal exemption policy should not be frustrated by such consensual waivers and recommends that creditors be allowed to enforce waivers of exemptions only if they have a security interest in the potentially exempt property.<sup>116</sup> Recognizing that creditors may nonetheless indirectly frustrate the federal exemption policy simply by making it a practice to take a security interest in exempt property, the Commission further recommends that nonpurchase money security interests in items of property

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<sup>109</sup>*Id.* at 182.

<sup>110</sup>*Id.* The bankrupt would also be allowed an additional \$500 of equity for each dependent; if the debtor has no home, or if the value of his home is less than the maximum allowed exemption, he would be allowed, up to the maximum amount, extra amounts for clothing, jewelry, home furnishings, cash, securities, burial plots, income tax refunds, etc. *Id.*

<sup>111</sup>*Id.*

<sup>112</sup>Bankruptcy Act § 7a(8).

<sup>113</sup>*Id.* § 47a(6).

<sup>114</sup>COMM'N REP. 181.

<sup>115</sup>*Id.* at 180; Bankruptcy Act § 6.

<sup>116</sup>COMM'N REP. 181.

essential to the well-being of the discharged debtor not be enforceable.<sup>117</sup>

The present Bankruptcy Act requires that debts which have priority be paid in full before any general creditors may share in the bankrupt's estate.<sup>118</sup> Debts which are accorded priority status are administrative expenses,<sup>119</sup> wages and commission owed by a bankrupt employer,<sup>120</sup> costs and expenses of creditors in adducing evidence resulting in the conviction of any person of an offense under Chapter IX of title 18 of the United States Code,<sup>121</sup> taxes which are not released by a discharge in bankruptcy,<sup>122</sup> other debts owing to persons who are entitled to priority by federal law other than the Bankruptcy Act,<sup>123</sup> and rent owing to a landlord who is entitled to priority by applicable state law.<sup>124</sup>

A provision which grants priority status to some creditors and relegates the left-overs to others appears to be in conflict with the goal of federal bankruptcy legislation to provide fair and equitable treatment to all creditors. Although some priorities are necessary if the bankruptcy system is to function,<sup>125</sup> the Commission asserts

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<sup>117</sup>*Id.*

<sup>118</sup>Bankruptcy Act § 64a.

<sup>119</sup>*Id.* § 64a(1). This includes costs of preserving the bankrupt's estate subsequent to the filing of the petition, fees for the referee's salary and expense fund, filing to be paid by the debtor, reasonable costs of recovering property transferred by the debtor in fraud of his creditors, trustee's expenses in opposing the bankrupt's discharge or in connection with the prosecution of an offense under 18 U.S.C. § 151 *et seq.* (1970), witness fees, and one reasonable attorney's fee.

<sup>120</sup>Wages have priority up to \$600 to each claimant if such wages have been earned within three months before the commencement of the proceeding. Bankruptcy Act § 64a(2). A proposed revision would increase the priority to \$3000, H.R. 11960, 93d Cong., 1st Sess. (1973).

<sup>121</sup>Also included here are costs to the creditor in securing the refusal, revocation, or setting aside of the bankruptcy discharge. Bankruptcy Act § 64a(3).

<sup>122</sup>See text accompanying notes 87-89 *supra*.

<sup>123</sup>The federal priority arises under 31 U.S.C. § 191 (1970) (often referred to by its designation in the Revised Statute of 1875, REV. STAT. § 3466 (1875)). See Plumb, *The Federal Priority in Insolvency: Proposals for Reform*, 70 MICH. L. REV. 3 (1971).

<sup>124</sup>Rent claims for actual use and occupancy within the three months prior to the petition share equally with the nontax claims of the federal government.

<sup>125</sup>If the trustees and attorneys are to be encouraged to take bankruptcy cases, they must be assured of being paid for their efforts. Further, the judicial machinery must be funded, to some extent, out of contributions by litigants.

that not all of the priority categories of the present Act are valid. The Commission would limit priorities to three types: administrative expenses, wages and commissions owed by bankrupt employers, and taxes not released by a discharge in bankruptcy.<sup>126</sup> Given the proposal of the Commission to reduce the time period for nondischargeable tax claims from three years preceding bankruptcy to one year, the proposed priority provisions represent a significant attempt to increase the probability of a return to general creditors.

A creditor who has taken security for a debt in the property of the debtor enjoys a priority to the extent of the value of his collateral. The value of the security held by a secured creditor is determined by converting the security into money pursuant to the security agreement, or by the creditor and the trustee by agreement, arbitration, compromise, or litigation.<sup>127</sup> The value of the security is credited against the claim of the secured creditor and, to the extent that the claim is in excess of the value of the security, the secured creditor is treated as a general creditor.<sup>128</sup> Thus, in effect, only the unsecured portion of a secured debt is discharged in bankruptcy; the secured portion is satisfied by the security, either because the collateral is abandoned by the trustee in favor of the creditor or because the creditor is permitted to enforce the security agreement outside bankruptcy.<sup>129</sup>

The fact that the creditor may be permitted to enforce the security agreement outside bankruptcy should, in theory, present no real hardship to the consumer debtor if the collateral is not exempt property. Nonexempt property would have been lost to the bankrupt in any event, whether in satisfaction of the secured claim or whether in satisfaction of priority claims and claims of general creditors. However, if the collateral is exempt property, to permit the secured creditor to enforce the security agreement may seriously frustrate both the exemption policy and the discharge policy of the Bankruptcy Act. Exempt property is, for the most part, made up of the personal property of the debtor, which is typically of little economic value to the creditor and of great economic and practical importance to the debtor in the post-discharge

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<sup>126</sup>COMM'N REP. 226-30.

<sup>127</sup>Bankruptcy Act § 57h. The security interest must, of course, be valid.

<sup>128</sup>*Id.*

<sup>129</sup>See generally Moo, *Secured Creditor in Bankruptcy*, 47 AM. BANKR. L.J. 23 (1973); Countryman, *A Reply to Moo*, 47 AM. BANKR. L.J. 73 (1973); 50 N.C.L. REV. 90 (1971).

maintenance of his household. The creditor, by threatening to repossess collateral needed by the debtor, may often hold enough leverage to obtain from the debtor a reaffirmation of the entire prebankruptcy debt.

Any creditor may attempt to obtain a reaffirmation of a debt discharged in bankruptcy. The moral obligation to pay one's debts is held to be sufficient consideration for the post-discharge promise to pay.<sup>130</sup> Although a secured creditor whose collateral is exempt property of the debtor holds perhaps the most persuasive of threats to obtain reaffirmation, any creditor who is permitted to enforce a security agreement outside bankruptcy, whether the security is exempt or not by the terms of the Bankruptcy Act, may use the threat of repossession in an attempt to obtain a reaffirmation. The strength of the threat depends more upon the value of the collateral to the debtor than upon whether the Bankruptcy Act classifies the collateral as exempt or nonexempt. In fact, any creditor with whom the debtor deals during or after discharge may condition some desired future performance upon a promise to pay the entire amount of the discharged debt and thereby totally negate the protective and rehabilitative effects of the discharge.

The present Bankruptcy Act makes no attempt to curtail post-bankruptcy reaffirmations of discharged debts. The Commission, on the other hand, proposes to establish the general rule that reaffirmations are unenforceable.<sup>131</sup> The only exception to this absolute rule would be made in the case of a secured debt; however, even a secured debt could only be affirmed to the extent of the fair market value of the collateral.<sup>132</sup> The proposed provision would, in effect, give the debtor an opportunity to redeem the collateral which secures a dischargeable debt upon payment of its fair market value or of the amount of the debt, whichever is less.<sup>133</sup>

The Commission notes that the "fresh start" policy of the Bankruptcy Act has been eroded by provisions of state and federal law which subject an individual who obtains a discharge, and fails to pay a discharged debt, to discriminatory treatment.<sup>134</sup> The Commission does not propose to establish a law by which the past

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<sup>130</sup>See Boshkoff, *The Bankrupt's Moral Obligation to Pay his Discharged Debts: A Conflict between Contract Theory and Bankruptcy Policy*, 47 IND. L.J. 36 (1971).

<sup>131</sup>COMM'N REP. 184.

<sup>132</sup>*Id.*

<sup>133</sup>*Id.* at 184-85.

<sup>134</sup>See *Perez v. Campbell*, 402 U.S. 637 (1971); COMM'N REP. 187.

or present financial condition of a debtor may never be taken into consideration, but recommends that a nondiscrimination provision in the Bankruptcy Act supercede any discriminatory state or federal laws.<sup>135</sup>

### C. Wage Earner Plans

Chapter XIII of the present Bankruptcy Act provides that a debtor whose principal income is derived from wages, salary, or commissions may petition the bankruptcy court to effect a plan for a composition and/or an extension of time for the payment of his debts.<sup>136</sup> The petition may be filed originally<sup>137</sup> or in a pending bankruptcy proceeding either before or after the debtor's adjudication.<sup>138</sup> A plan *must* include provisions dealing with unsecured debts in general upon any terms, it *may* include provisions dealing with secured debts on any terms, it *may* provide for priority payment during the period of extension between secured and unsecured debts affected by it, and it *must* provide for the submission of the future earnings of the debtor to the supervision and control of the bankruptcy court for the purpose of enforcing the plan.<sup>139</sup>

Upon the filing of a Chapter XIII petition, the court must promptly call a meeting of creditors and, at this meeting, determine the creditors' acceptances of the proposed plan.<sup>140</sup> If all creditors affected by the plan accept it in writing at the initial meeting, it will be confirmed when the debtor has made the deposits required by the Act and the court is satisfied that the plan and the acceptances are in good faith and not made or procured by any means forbidden by the Bankruptcy Act.<sup>141</sup> This confirmation will be made regardless of whether the creditors have proved their claims.

If the plan is not accepted at the initial meeting of the creditors, it may still be confirmed if accepted at a later date in writing

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<sup>135</sup>COMM'N REP. 187.

<sup>136</sup>Bankruptcy Act § 606(8).

<sup>137</sup>*Id.* § 622.

<sup>138</sup>*Id.* § 621.

<sup>139</sup>*Id.* § 646. The plan must also provide that the court may increase or reduce the amount of installment payments or extend or shorten the time for such payments after notice and hearing when the circumstances of the debtor so require. The plan may include provisions for the rejection of executory contracts of the debtor.

<sup>140</sup>*Id.* §§ 632, 633.

<sup>141</sup>*Id.* § 651. At the initial meeting, the court must also appoint a trustee to receive and distribute moneys to be paid pursuant to the plan. *Id.* § 633.

by a majority in number and amount of all unsecured creditors whose claims have been proved and allowed before the conclusion of the initial meeting and by all secured creditors whose claims are dealt with by the plan.<sup>142</sup> Before confirmation, however, the court must be satisfied that the plan is feasible and in the best interests of the creditors, that the debtor has not been guilty of any acts which would be a bar to a discharge of his debts, and that the proposal and its acceptance are in good faith.<sup>143</sup> If the plan is not accepted, or if it may not be confirmed, or if after confirmation the debtor defaults, the court must dismiss the Chapter XIII proceedings and adjudge the debtor a bankrupt.<sup>144</sup>

Upon confirmation, the plan and its provisions are binding on the debtor and his creditors, whether or not they are affected by it, have accepted it, or have filed their claims and whether or not their claims have been scheduled or allowed.<sup>145</sup> Upon completion of the plan, the court must enter an order discharging the debtor from all debts affected by it; however, the unpaid portions of those debts which are excepted from discharge and are held by creditors who have not accepted the plan are not discharged upon completion.<sup>146</sup>

Although Chapter XIII received much acclaim when it was added to the Chandler Act in 1938,<sup>147</sup> and although the Commission was informed that the majority of consumer debtors desire such a means of paying their debts rather than incurring the stigma and other consequences of a straight bankruptcy discharge,<sup>148</sup> the

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<sup>142</sup>*Id.* § 652a.

<sup>143</sup>*Id.* § 655.

<sup>144</sup>*Id.* § 666. The court will adjudge the debtor a bankrupt with the debtor's consent if the petition was an original one and notwithstanding the debtor's consent or lack thereof if the petition under Chapter XIII was filed in a pending bankruptcy proceeding.

<sup>145</sup>*Id.* § 657. The bankruptcy court retains jurisdiction of the debtor and his property for all purposes of the plan and may issue any orders required to effectuate the plan's provisions. *Id.* § 658. No creditor may attempt to reach the future earnings of the debtor without the approval of the bankruptcy court. *Id.*

<sup>146</sup>*Id.* § 660. Thus, for example, if the plan were one of composition, so that upon completion some debts had not been paid in full, the unpaid portions of all excepted debts held by creditors who did not accept the plan would not be discharged. All other debts affected by the plan would be discharged upon completion.

<sup>147</sup>COMM'N REP. 170.

<sup>148</sup>*Id.*

use and success of the Chapter XIII option has been sporadic.<sup>149</sup> The Commission discovered several factors contributing to the disparity of use throughout the United States including: the lack of knowledge of the petitioning debtor of the advantages, or even the availability, of Chapter XIII relief; differing attitudes of referees, attorneys, and the credit community toward Chapter XIII petitioners; and varying knowledge and experience of attorneys consulted by debtors with financial problems.<sup>150</sup> The recommendations of the Commission for modification of the structure of the bankruptcy system are directed toward combatting these factors.<sup>151</sup> Likewise, the recommendations of the Commission for changes in the substantive law of bankruptcy reflect the Commission's belief that, while a debtor should not be forced to participate in a plan which requires contributions out of future earnings, wage earner plans of the Chapter XIII type should be encouraged.<sup>152</sup>

The Commission recommends that the definition of eligible petitioners be broadened. The present Act limits Chapter XIII relief to those individuals "whose principal income is derived from wages, salary, or commissions."<sup>153</sup> Although this provision has been liberally construed by the courts,<sup>154</sup> the Commission contends that there should be no such limitation written into the Act and proposes that eligible petitioners be defined to include those individuals whose principal income is derived from any "source with sufficient regularity and stability that periodical payment of a fixed amount to . . . creditors pursuant to a plan . . . is feasible."<sup>155</sup>

The Commission's study revealed that, under the present Act, a debtor is often counseled not to elect Chapter XIII relief if it is not feasible for him to pay the full amount of his indebtedness plus the costs of administration within a three year period.<sup>156</sup>

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<sup>149</sup>*Id.* Chapter XIII is extensively used in Alabama, Ohio, California, Georgia, Tennessee, Kansas and Maine; other districts, however, have records which do not disclose any Chapter XIII filings since 1938. *Id.*

<sup>150</sup>COMM'N REP. 24-25.

<sup>151</sup>See text accompanying notes 27-41 *supra*.

<sup>152</sup>COMM'N REP. 172.

<sup>153</sup>Bankruptcy Act § 606(8).

<sup>154</sup>*E.g., In re Bradford*, 268 F. Supp. 896 (N.D. Ala. 1967) (sole income derived from social security benefits).

<sup>155</sup>COMM'N REP. 176. (This is the language of § 1-102(28) of the proposed Act.)

<sup>156</sup>COMM'N REP. 172.

The three year suggestion is apparently an offshoot of a section of the present Act which provides that if a debtor has not completed his payments under a plan at the expiration of three years after confirmation, and if the debtor's failure to complete his payments was due to circumstances not within his control, the debtor may apply for, and the court may grant, a discharge of all remaining debts provided for by the plan.<sup>157</sup> Although this provision in no way requires that the debtor propose in his plan to complete payments within three years, its effect is to make creditors wary of the prospect of any payment after the three year period. Counselors probably rightly assume that creditor consent will be difficult to obtain if the plan is to continue for more than three years; and without creditor consent a plan may not be confirmed. The reason for the suggestion that the debtor propose to pay *all* his debts within the three year period is again not that the Act requires that the debtor propose to pay his indebtedness in full; in fact, the Act specifically authorizes compositions in which the debtor may propose to pay only part of his indebtedness.<sup>158</sup> Rather, payment in full is encouraged, and payment in part by use of the composition feature discouraged, because confirmation of a plan involving a composition absolutely precludes subsequent relief under the Act for six years.<sup>159</sup>

The Commission's proposal that confirmation of a plan of composition should not limit future relief under the Act would eliminate a significant deterrent to the use of the composition feature of Chapter XIII.<sup>160</sup> The recommendation of the Commission that the debtor who opts for the extension type of wage earner plan should in no case pay more than the aggregate of all his debts would remove a practical impediment to the viability of the extension option.<sup>161</sup> Creditors typically have a chance to receive more money on the dollar if a wage earner plan is successful than if the debtor obtains an immediate discharge and should be willing to give up a portion of their return to insure the feasibility of the successful completion of such a plan. Therefore the Commission reasons that the allocation of the burden of the administrative

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<sup>157</sup>Bankruptcy Act § 661. Many debtors fail to keep up payments due to unforeseen circumstances. COMM'N REP. 172.

<sup>158</sup>Bankruptcy Act § 606(7). *See* note 60 *supra*.

<sup>159</sup>Bankruptcy Act § 14c(5). Both a plan for composition and a plan for a combination composition and extension preclude subsequent relief.

<sup>160</sup>*See* text accompanying note 57 *supra*.

<sup>161</sup>COMM'N REP. 173. This is a codification of a procedure used successfully in Seattle, Washington.

costs to creditors would be more reasonable than the allocation of such costs to the debtor.<sup>162</sup>

Chapter XIII of the present Bankruptcy Act requires that a wage earner plan be accepted either at the initial meeting by *all* unsecured creditors or at a later date by a majority in number and amount of all general creditors whose claims have been proved and allowed before the conclusion of the initial meeting.<sup>163</sup> Unanimous consent, especially at the initial stage of a proceeding, is rarely obtained. Furthermore, few creditors' claims are proved and allowed before the conclusion of the initial meeting and thus few unsecured creditors qualify to vote in the later determination. Finally, of those who do qualify to vote, few object to proposed wage earner plans, since the alternative is a straight bankruptcy discharge in which the general creditors are last in priority.<sup>164</sup> Given these practical considerations, the Commission recommends that the requirement of creditor consent be eliminated.<sup>165</sup> As a safeguard of the creditors' interests, the Commission proposes that an independent determination be made by the Administrator that the provisions of the Chapter have been complied with and that the plan is in the best interests of the creditors, is feasible, and is proposed in good faith.<sup>166</sup> Any creditor could file with the Administrator objections to confirmation. Then, if a plan were confirmed in spite of these objections, the objecting creditor, by filing a timely complaint in the bankruptcy court, could judicially challenge the Administrator's determination.<sup>167</sup>

Since most of the litigation that has arisen under Chapter XIII has involved the rights of secured creditors, the Commission proposes a clarification of these rights.<sup>168</sup> Under the present Act, a secured creditor has a veto over any plan which deals in any way with his claim.<sup>169</sup> Also, under the present Act, the court may enjoin any proceeding to enforce a lien upon the property of the debtor.<sup>170</sup> The case law is in conflict as to whether a plan which does not mention a secured debt may be vetoed by the creditor

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<sup>162</sup>*Id.*

<sup>163</sup>Bankruptcy Act § 652(1).

<sup>164</sup>COMM'N REP. 174.

<sup>165</sup>*Id.*

<sup>166</sup>*Id.*

<sup>167</sup>*Id.* at 175.

<sup>168</sup>*Id.* at 176.

<sup>169</sup>Bankruptcy Act § 652(1).

<sup>170</sup>*Id.* § 614.

if the court enjoins the creditor's right to repossess.<sup>171</sup> The Commission would codify the view of the probable weight of authority that, if a creditor is protected to the extent of the value of his collateral, there is no reason to afford him a veto of the plan.<sup>172</sup>

The Commission proposes to remedy certain other provisions of Chapter XIII of the present Bankruptcy Act which tend to frustrate and limit its use. The present Act provides that a wage earner plan may not be confirmed if the debtor has been guilty of any acts which would have been a bar to his discharge if he had opted for straight bankruptcy.<sup>173</sup> The Commission is of the opinion that this is an "inappropriate limitation of the court's ability to confirm a plan in which the debtor proposes to pay his debts out of his future earnings."<sup>174</sup> The court or the Administrator should not be precluded from confirming a plan that meets the tests of good faith and best interests of creditors.<sup>175</sup>

Chapter XIII of the present Act is practically limited by the fact that it contemplates payment of debts *only* out of future earnings.<sup>176</sup> Often a debtor has assets which could be applied immediately to payment of his debts and the fact that these may not be used may result either in an objection by a creditor or in a determination that the plan is not in the best interests of the creditors.<sup>177</sup> In order to encourage wage earner plans and to promote fair treatment of creditors, the Commission recommends that the proposed Act authorize, but not require except as necessary to meet the best interests and good faith tests, the application of nonexempt assets to the immediate payment of the debtor's obligations.<sup>178</sup>

The Commission notes that the success of a wage earner plan may be jeopardized by guarantors of the debtor's obligations who have been compelled to pay by the Chapter XIII debtor's creditors who are not willing to await payment pursuant to the plan.<sup>179</sup> Although it is possible for a plan under the present Act

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<sup>171</sup>COMM'N REP. 177. Compare *Cheetham v. Universal C.I.T. Corp.*, 390 F.2d 234 (1st Cir. 1968), with *In re O'Dell*, 198 F. Supp. 389 (D. Kan. 1961).

<sup>172</sup>COMM'N REP. 177.

<sup>173</sup>Bankruptcy Act § 656a(3).

<sup>174</sup>COMM'N REP. 175.

<sup>175</sup>*Id.*

<sup>176</sup>See Bankruptcy Act § 658.

<sup>177</sup>COMM'N REP. 175-76.

<sup>178</sup>*Id.* at 176.

<sup>179</sup>*Id.* at 178.

to deal with the creditor's claim against the surety as well as the debtor, it is unlikely that the creditor's consent to such a plan would be forthcoming.<sup>180</sup> Thus, if the debtor's plan is to be accepted and confirmed, he must subject himself to the pressures of the surety with no protection from the Bankruptcy Act. To protect the debtor in the performance of his plan, the Commission recommends that the Act impose a moratorium on collections from the co-debtor of any debt which is being paid under the plan, but only so long as the debtor is performing under the plan.<sup>181</sup> The moratorium would terminate when the case was closed or was converted to one of straight bankruptcy.<sup>182</sup>

The recommendations of the Commission for changes in the substantive law affecting wage earner plans evidence an attempt to more realistically balance the interests of debtors and creditors in the hope of fostering such plans.

#### V. CONSUMER CASES: INVOLUNTARY

The present Bankruptcy Act provides that any "natural person" who owes debts of \$1000 or more, except a wage earner or a farmer, may be adjudged an involuntary bankrupt.<sup>183</sup> Three or more creditors who have provable claims amounting in the aggregate to \$500 in excess of the value of any securities held by them may file a petition to have a debtor adjudicated.<sup>184</sup> The general rule is that an involuntary petition must be filed within four months after the commission of an "act of bankruptcy."<sup>185</sup> The present Act specifies six "acts of bankruptcy" and provides complex tests to determine exactly when each "act" occurs.<sup>186</sup>

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<sup>180</sup>*Id.*

<sup>181</sup>*Id.*

<sup>182</sup>*Id.*

<sup>183</sup>Bankruptcy Act §§ 4b, 59b.

<sup>184</sup>*Id.* § 59. If the total number of creditors is less than twelve, one or more creditors with claims totalling \$500 may file an involuntary petition.

<sup>185</sup>*Id.* § 3b.

<sup>186</sup>The specified acts of bankruptcy are: concealing or removing property with intent to hinder or defraud creditors; making a preferential transfer under § 60a of the Act; suffering, while insolvent, a creditor to obtain a lien on his property; making a general assignment for the benefit of his creditors, while insolvent; permitting the appointment of a receiver; or admitting in writing an inability to pay one's debts and a willingness to be adjudged a bankrupt. *Id.* § 3a. Tests to determine when each "act" occurs are found at *id.* § 36.

A debtor against whom an involuntary petition has been filed must respond to the petition much as he would to any lawsuit filed against him. He must plead and appear or else be adjudicated in default.<sup>187</sup> He may controvert the facts in his pleadings and may make a timely demand for a jury trial on the issues of his insolvency and the commission of an act of bankruptcy.<sup>188</sup>

Typically, it is not difficult for a creditor to initiate an involuntary proceeding under the present Act.<sup>189</sup> However, it may be difficult and time-consuming to obtain an adjudication of bankruptcy. The requirement of an act of bankruptcy increases the time between the first indication of the debtor's inability to pay his debts and the filing of the petition.<sup>190</sup> Conducting a jury trial may also cause substantial delay.<sup>191</sup> The Commission believes that the inability to force a proceeding at an early stage and to obtain a timely determination has "frustrated a prime goal of federal bankruptcy legislation, equitable treatment of creditors."<sup>192</sup> Restrictions which delay relief too long are a substantial factor causing a typically low return to creditors and subsequent creditor dissatisfaction and lack of interest in the bankruptcy system.<sup>193</sup> The Commission would amend the present Act to encourage and authorize earlier resort to relief.<sup>194</sup>

The Commission recommends that all persons eligible for voluntary relief be subject to involuntary relief, with the sole exception of the individual farmer.<sup>195</sup> The present Act excludes "wage earners," but since a wage earner is defined as an individual who works for "wages, salary, or hire at a rate of compensation not exceeding \$1500 per year,"<sup>196</sup> the exclusion has little practical effect. Nonetheless, the Commission would include no

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<sup>187</sup>*Id.* § 18b.

<sup>188</sup>*Id.* § 19.

<sup>189</sup>COMM'N REP. 201. The required number of creditors and the required amounts are minimal. Most debtors in financial difficulty can be found to have committed one of the several acts of bankruptcy.

<sup>190</sup>*Id.*

<sup>191</sup>In addition to the typical delay of sequestering the jury, there is further delay because the referee does not have the power to hear jury trials and the case must be fitted into the schedule of a federal district judge.

<sup>192</sup>COMM'N REP. 203.

<sup>193</sup>*Id.* at 199.

<sup>194</sup>*Id.* at 200.

<sup>195</sup>*Id.* at 198.

<sup>196</sup>Bankruptcy Act § 1(32).

such limitation upon eligibility for involuntary relief and would make the source of an individual's earnings in no way determinative.<sup>197</sup>

The Commission would abandon the complex, artificial, technical, and litigation-producing concept of an act of bankruptcy in favor of a simple test of inability or failure to pay debts as they become due.<sup>198</sup> Recognizing the possibility that such a simple test might be subject to abuse or misuse in the form of unfounded petitions or might result in the temporary financial embarrassment of a debtor unnecessarily or improperly subjected to an expensive federal proceeding, the Commission directs attention to mitigating features in the proposed Act.<sup>199</sup> The Commission believes that its recommendations for change in the structure of the bankruptcy system make it possible to give substantial discretion to the bankruptcy judge.<sup>200</sup> This discretion would provide a "far better safeguard against unwise and malicious petitions than the existing litigation-producing restrictions on the institution of involuntary proceedings."<sup>201</sup> The Commission further believes that this grant of discretion would eliminate the need for a jury trial as to the appropriateness of relief.<sup>202</sup> Perhaps the most important safeguard provision of the proposed Act is that which allows the judge to require that a petitioner file a bond indemnifying the debtor against costs, counsel fees, expenses, and damages.<sup>203</sup> If the involuntary petition were dismissed, all but damages would be awarded the debtor as a matter of course; if the debtor could prove that the petition was filed in bad faith, damages proximately caused by the petition could be recovered.<sup>204</sup>

## VI. CONCLUSION

The recommendations of the Commission for changes in the present Bankruptcy Act evidence a studied effort to balance the interests of debtors and creditors involved in the bankruptcy process. These recommendations are based upon the Commission's comprehensive study of the practical and theoretical problems

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<sup>197</sup>COMM'N REP. 199, 237.

<sup>198</sup>*Id.* at 201.

<sup>199</sup>*Id.*

<sup>200</sup>*Id.* at 202.

<sup>201</sup>*Id.* at 203.

<sup>202</sup>*Id.*

<sup>203</sup>*Id.*

<sup>204</sup>*Id.*

which have been encountered under the present Bankruptcy Act. Perhaps the substantive provisions of the proposed Bankruptcy Act, if enacted into law, will not withstand the test of time and will require further comprehensive revision. Perhaps the substantive provisions of the proposed Bankruptcy Act will not accomplish all that the Commission believes can and should be accomplished. Nonetheless, the proposed Act seems to be a progressive step toward attaining the goals of the federal bankruptcy process: easy accessibility of debtors and creditors to the process, fair and equitable treatment of creditors involved in the process, and rehabilitation of honest but unfortunate debtors for more productive future participation within the credit community and society by providing more lasting, more timely, and more meaningful relief.

DEBRA A. FALENDER

## APPELLATE REVIEW OF CIRCUMSTANTIAL EVIDENCE IN INDIANA CRIMINAL CASES

The United States Supreme Court has expressly held that the due process clause of the fourteenth amendment protects an accused against conviction except upon proof beyond a reasonable doubt.<sup>1</sup> Similarly, under Indiana statutory law, a defendant must be acquitted when there is a reasonable doubt of his guilt.<sup>2</sup> This Note will review the tests that the Supreme Court of Indiana and the Indiana Court of Appeals<sup>3</sup> have evolved for insuring convictions only upon proof of guilt beyond a reasonable doubt in cases in which the evidence against the accused is circumstantial in nature.

The reasonable doubt standard<sup>4</sup> has been described as "a prime instrument for reducing the risk of convictions resting

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<sup>1</sup>*In re Winship*, 297 U.S. 385, 364 (1970).

<sup>2</sup>IND. CODE § 35-1-36-1 (1971).

<sup>3</sup>Jurisdiction to hear criminal appeals was only recently extended to the Indiana Court of Appeals under the Judicial Amendment to the Indiana Constitution adopted November 2, 1970. IND. CONST. art. 7, § 6.

<sup>4</sup>Attempts have been made to define the reasonable doubt standard both quantitatively and qualitatively. The definition most often appearing in Indiana decisions is:

The rule of law defining proof beyond a reasonable doubt is well settled. It requires the trier of the facts to be so convinced by the evidence that as a prudent man he would feel safe to act upon such conviction in matters of the highest concern and importance to his own nearest, dearest and most important interests in circumstances where there was no compulsion or coercion to act at all.

*Easton v. State*, 248 Ind. 338, 344-45, 288 N.E.2d 6, 11 (1967). *Accord*, *Greer v. State*, 252 Ind. 20, 30, 245 N.E.2d 158, 163-64 (1969); *Smith v. State*, 243 Ind. 74, 79, 181 N.E.2d 520, 522 (1962); *Baker v. State*, 236 Ind. 55, 61, 138 N.E.2d 641, 644 (1956).

For articles discussing reasonable doubt as a mathematical standard, see Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065 (1968); Liddle, *Mathematical and Statistical Probability as a Test of Circumstantial Evidence*, 19 CASE W. RES. L. REV. 254 (1968); Note, *Evidence: Admission of Mathematical Probability Statistics Held Erroneous for Want of Demonstration of Validity*, 1967 DUKE L.J. 665.

For discussions of the difficulty of defining the reasonable doubt standard, see C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 341, at 799-800 (2d ed. 1972) [hereinafter cited as McCORMICK]; 1 H. UNDERHILL, CRIMINAL EVIDENCE § 25, at 43 (6th ed. 1973) [hereinafter cited as UNDERHILL]; 9 J. WIGMORE, EVIDENCE § 2497, at 317 (3d ed. 1940) [hereinafter cited as WIGMORE].

on factual error.”<sup>5</sup> The requirement of such a high standard of proof in criminal cases stems from a fundamental belief that it is far worse to convict an innocent man of a crime than to let a guilty man go free.<sup>6</sup> A few Indiana cases have limited the application of the reasonable doubt standard to the trial level.<sup>7</sup> However, the most frequently cited appellate standard of review is that there must be substantial evidence of probative value to establish every material element of the crime beyond a reasonable doubt.<sup>8</sup>

It is apparent from the clandestine nature of criminal activity that convictions frequently will be wholly dependent upon circumstantial evidence.<sup>9</sup> In Indiana, a verdict of guilty may be

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<sup>5</sup>*In re Winship*, 397 U.S. 358, 363 (1970).

<sup>6</sup>McCORMICK § 341, at 798. See also Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880 (1968). Professor Fletcher, in discussing the concern of Western societies that only the guilty be punished, related:

This concern prompted Hale to remark in the late 1600's that five guilty men should be acquitted before one innocent man is convicted. This kind of ratio, expressing toleration for acquitting the guilty has become a stock figure of common law rhetoric; Blackstone raised the ratio to ten to one, and others of libertarian sentiment have favored twenty to one. Like the presumption of innocence, these ratios express a commitment to the dignity of the individual.

*Id.* at 881.

<sup>7</sup>*Coach v. State*, 250 Ind. 226, 227, 235 N.E.2d 493, 494 (1968); *Greenwalt v. State*, 246 Ind. 608, 615, 209 N.E.2d 254, 257 (1965); *Robinson v. State*, 243 Ind. 192, 197, 184 N.E.2d 16, 18 (1962).

<sup>8</sup>*Hendrickson v. State*, 295 N.E.2d 810, 811 (Ind. 1973); *McFarland v. State*, 295 N.E.2d 809 (Ind. 1973).

<sup>9</sup>Although the meaning of the term circumstantial evidence is generally well understood, Professor McCormick's illustration of the differing effects of circumstantial and direct evidence upon the thought processes of the trier of fact is helpful:

The characterization of evidence as “direct” or “circumstantial” points to the kind of inference which is sought to be drawn from the evidence to the truth of the proposition for which it is offered. If a witness testifies that he saw A stab B with a knife, and this testimony is offered to prove the stabbing, the inference sought is merely from the fact that the witness made the statement, and the assumption that the witnesses are worthy of belief, to the truth of the asserted fact. This is direct evidence. When, however, the evidence is offered also for some further proposition based upon some inference other than merely the inference from assertion to the truth of the fact asserted, then the evidence is circumstantial evidence of this further fact-to-be-inferred. Thus in the case mentioned if the stabbing were proved and the culprit in doubt, testimony

based on circumstantial evidence alone,<sup>10</sup> but the reasonable doubt standard applies regardless of whether the evidence presented at trial is circumstantial or direct.<sup>11</sup> In the event that the conviction is entirely dependent upon circumstantial evidence, a variation of the reasonable doubt standard has been recognized. It has been held that such evidence must exclude every reasonable hypothesis of innocence before it will be sufficient to prove an accused's guilt beyond a reasonable doubt. Although this special standard to be applied in circumstantial evidence cases is a viable doctrine in Indiana today, it has had a difficult history and is sporadically applied. At the present time, the Indiana courts apply conflicting tests in reviewing the sufficiency of circumstantial evidence in criminal cases. The origin, application, conflict, and adequacy of these tests are the subject of this Note.

### I. REASONABLE HYPOTHESIS OF INNOCENCE TEST

The reasonable hypothesis of innocence test requires that circumstantial evidence must not merely be consistent with the hypothesis of innocence to be sufficient to sustain a conviction.<sup>12</sup> The first reported case in Indiana mentioning this test is *Sumner v. State*.<sup>13</sup> In *Sumner*, the supreme court approved a jury instruction to the effect that circumstantial evidence, to be sufficient, should exclude every supposition inconsistent with guilt.<sup>14</sup> The first reported Indiana case to use the reasonable hypothesis test as a tool in aid of appellate review of sufficiency of the evidence is *Schusler v. State*.<sup>15</sup> In that case, a grocer was struck on the back of the head while locking up his store for the evening. He later died from the blow, and Schusler was con-

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that A fled from the scene, offered to show his probable guilt, would be direct evidence of the flight but circumstantial evidence of his murderous act. . . .

MCCORMICK § 185, at 435. See generally A. BURRILL, A TREATISE ON THE NATURE, PRINCIPLES AND RULES OF CIRCUMSTANTIAL EVIDENCE, ESPECIALLY THAT OF THE PRESUMPTIVE KIND, IN CRIMINAL CASES 4-8 (2d ed. 1859); UNDERHILL § 15, at 23; WIGMORE § 25, at 398.

<sup>10</sup>*Gregory v. State*, 286 N.E.2d 666, 668 (Ind. 1972); *Johnson v. State*, 284 N.E.2d 517, 519 (Ind. 1972).

<sup>11</sup>*Sutherlin v. State*, 148 Ind. 695, 698, 48 N.E. 246, 247 (1897); *Guyton v. State*, 299 N.E.2d 233, 237 (Ind. Ct. App. 1973); IND. CODE § 35-1-36-1 (1971).

<sup>12</sup>*Falk v. State*, 182 Ind. 317, 321, 106 N.E. 354, 355 (1914).

<sup>13</sup>5 Blackf. 579 (Ind. 1841).

<sup>14</sup>*Id.* at 581.

<sup>15</sup>29 Ind. 394 (1868).

victed of first degree murder. The defendant had previously made threats against the deceased grocer, and his footprints, as well as the footprints of others, were found in the alley next to the store. The supreme court, in reversing the conviction, stated that "[t]o sustain such a conviction, the facts proved must be susceptible of explanation upon no reasonable hypothesis consistent with the innocence of the person charged."<sup>16</sup> Until 1901, the supreme court continued to reaffirm the reasonable hypothesis of innocence test as a proper test to be applied both at the trial level<sup>17</sup> and by the supreme court itself in reviewing the sufficiency of the evidence.<sup>18</sup>

In 1901, the supreme court decided the case of *Lee v. State*<sup>19</sup> on facts similar to *Schusler* but with a surprisingly opposite result. In *Lee*, a grocer was struck on the back of the head as he was locking his store for the night and robbed of his watch and cash while unconscious. This grocer survived the blow, and Lee was convicted of assault and battery with intent to rob. Lee had been in the victim's grocery a short time before the attack and had asked the time. He was also later observed at closing time near the store carrying a cane. The supreme court affirmed Lee's conviction on the ground that it could only review the sufficiency of the evidence when there was an absence of evidence to support a material fact necessary to prove guilt. The court stated that "[t]he fact that the evidence upon which the judgment of the trial court rests may be said to be weak or unsatisfactory is not available on appeal."<sup>20</sup> In *Lee*, the supreme court expressly overruled an earlier case, *Hamilton v. State*,<sup>21</sup> which applied the reasonable hypothesis of innocence test, and established the conflicting inferences rule. The court held that when the circumstantial evidence in a case raises two conflicting inferences, one tending to prove the guilt of the accused and the other favorable to his innocence, it is not within the province of the appellate court to determine which inference should have been accepted by the jury.<sup>22</sup> For a period of sixty-seven years following the

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<sup>16</sup>*Id.* at 395.

<sup>17</sup>*Wantland v. State*, 145 Ind. 38, 40, 43 N.E. 931, 932 (1896); *Stout v. State*, 90 Ind. 1, 12 (1883).

<sup>18</sup>*Hamilton v. State*, 143 Ind. 276, 279, 41 N.E. 588, 589 (1895); *Cavender v. State*, 126 Ind. 47, 48, 25 N.E. 875 (1890).

<sup>19</sup>156 Ind. 541, 60 N.E. 299 (1901).

<sup>20</sup>*Id.* at 546, 60 N.E. at 301.

<sup>21</sup>142 Ind. 276, 41 N.E. 588 (1895).

<sup>22</sup>156 Ind. at 546, 60 N.E. at 301.

decision in *Lee*, the undisputed rule in Indiana was that the reasonable hypothesis of innocence test was exclusively for the guidance of juries and trial courts, not for appellate courts reviewing the sufficiency of the evidence.<sup>23</sup>

In 1968, in *Manlove v. State*,<sup>24</sup> the Supreme Court of Indiana carefully reviewed the general rules governing appellate review of sufficiency of the evidence and expressly readopted the reasonable hypothesis of innocence test for the appellate level. Judge Hunter, writing the opinion for the court, reasoned that when the evidence is wholly circumstantial and fails to exclude every reasonable hypothesis of innocence, such evidence is not sufficiently persuasive to allow a reasonable man to find the accused guilty beyond a reasonable doubt.<sup>25</sup> The court specifically disapproved language in *Christen v. State*,<sup>26</sup> which declared that the reasonable hypothesis of innocence test was solely for the guidance of the trier of fact. In reversing Manlove's second degree murder conviction, the court restated a rule often cited in sufficiency of the evidence cases: "A verdict based merely upon

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<sup>23</sup>*Dennison v. State*, 230 Ind. 353, 357, 103 N.E.2d 443, 444 (1952); *Christen v. State*, 228 Ind. 30, 38, 89 N.E.2d 445, 448 (1950); *White v. State*, 226 Ind. 309, 311, 79 N.E.2d 771, 772 (1948); *Scharillo v. State*, 207 Ind. 22, 24, 191 N.E. 76, 77 (1934); *Wrassman v. State*, 191 Ind. 399, 402, 132 N.E. 673 (1921).

During the period from 1901 to 1968, the Supreme Court of Indiana did seemingly apply the reasonable hypothesis of innocence test at the appellate level in four cases: *Hardesty v. State*, 249 Ind. 518, 231 N.E.2d 510 (1967); *Slater v. State*, 224 Ind. 627, 70 N.E.2d 425 (1947); *Osbon v. State*, 213 Ind. 413, 13 N.E.2d 233 (1938); *Falk v. State*, 182 Ind. 317, 106 N.E. 354 (1914). The *Osbon* and *Falk* decisions relied on *Cavender v. State*, 126 Ind. 47, 25 N.E. 875 (1890), which was disapproved in *Wrassman v. State*, 191 Ind. 399, 132 N.E. 673 (1921). *Hardesty* relied on *White v. State*, 226 Ind. 300, 79 N.E.2d 771 (1948), which held that the reasonable hypothesis of innocence test was for the guidance of the trier of fact; and *Slater* relied on *Osbon*.

Although *Lee v. State*, 156 Ind. 541, 60 N.E. 299 (1901), precluded the use of the reasonable hypothesis of innocence test at the appellate level, the Indiana Supreme Court continued to approve this special test as a jury instruction. *Krauss v. State*, 225 Ind. 195, 200, 73 N.E.2d 676, 678 (1947); *Robinson v. State*, 188 Ind. 467, 471, 124 N.E. 489, 490 (1919); *Dunn v. State*, 166 Ind. 694, 702, 78 N.E. 198, 200 (1906).

<sup>24</sup>250 Ind. 70, 232 N.E.2d 874 (1968).

<sup>25</sup>*Id.* at 79, 232 N.E.2d at 879.

<sup>26</sup>228 Ind. 30, 38, 89 N.E.2d 445, 448 (1950). Note that *Christen* had disapproved of *Osbon v. State*, 213 Ind. 413, 13 N.E.2d 233 (1938); *Falk v. State*, 182 Ind. 317, 106 N.E. 354 (1914); *Hamilton v. State*, 142 Ind. 276, 41 N.E. 588 (1895); and *Cavender v. State*, 126 Ind. 47, 25 N.E. 875 (1890). See notes 18, 23 *supra*.

suspicion, opportunity, probability, conjecture, speculation and unreasonable inferences of guilt . . . cannot be upheld."<sup>27</sup> Although the supreme court unequivocally readopted the reasonable hypothesis of innocence test in *Manlove*, this revitalization of the old rule was somewhat weakened by the court's opinion on petition for rehearing.<sup>28</sup> On rehearing, the court denied an assertion by the Attorney General that the court had altered its standard for reviewing the sufficiency of the evidence and reaffirmed the substantial evidence of probative value test.<sup>29</sup>

Since *Manlove*, the reasonable hypothesis of innocence test has been followed, ignored, and distinguished. An appeal based on the grounds that there is a reasonable hypothesis of innocence rendering the conviction invalid as based on insufficient evidence may or may not be successful. Of the eighteen cases handed down since 1968 applying the reasonable hypothesis of innocence test, twelve were reversed<sup>30</sup> and six were affirmed.<sup>31</sup> Of the twelve that were reversed, seven reversals were based on the ground that the evidence supported only a suspicion of guilt. This frequent coupling of the reasonable hypothesis of innocence test with the mere suspicion rule has been used in one decision of the Indiana Court of Appeals as a means of limiting the application of the reasonable hypothesis test. In *Glover v. State*,<sup>32</sup> the court recognized the reasonable hypothesis of innocence test as a test for reviewing circumstantial evidence but limited its application to fact situations involving evidence which provided only a suspicion of guilt or opportunity to commit the crime.

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<sup>27</sup>250 Ind. at 84, 232 N.E.2d at 882.

<sup>28</sup>250 Ind. 85, 235 N.E.2d 62 (1968).

<sup>29</sup>The probative value test is discussed in Part III *infra*.

<sup>30</sup>*Dunn v. State*, 293 N.E.2d 32 (Ind. 1973); *Banks v. State*, 257 Ind. 530, 276 N.E.2d 155 (1971); *Reynolds v. State*, 254 Ind. 478, 260 N.E.2d 793 (1970); *Seats v. State*, 254 Ind. 457, 260 N.E.2d 796 (1970); *Sharp v. State*, 254 Ind. 435, 260 N.E.2d 593 (1970); *Crawford v. State*, 251 Ind. 437, 241 N.E.2d 795 (1968); *Miller v. State*, 250 Ind. 338, 236 N.E.2d 173 (1968); *Carpenter v. State*, 307 N.E.2d 109 (Ind. Ct. App. 1974); *Anderson v. State*, 295 N.E.2d 832 (Ind. Ct. App. 1973); *Martin v. State*, 300 N.E.2d 128. (Ind. Ct. App. 1973); *Wilson v. State*, 304 N.E.2d 824 (Ind. Ct. App. 1973); *Bradley v. State*, 287 N.E.2d 759 (Ind. Ct. App. 1972).

<sup>31</sup>*Gregory v. State*, 286 N.E.2d 666 (Ind. 1972); *Martin v. State*, 250 Ind. 433, 235 N.E.2d 64 (1968); *Myers v. State*, 251 Ind. 126, 239 N.E.2d 605 (1968); *Tyler v. State*, 292 N.E.2d 630 (Ind. Ct. App. 1973); *Rogers v. State*, 290 N.E.2d 135 (Ind. Ct. App. 1972); *Williams v. State*, 288 N.E.2d 580 (Ind. Ct. App. 1972).

<sup>32</sup>300 N.E.2d 902 (Ind. Ct. App. 1973).

Another decision of the court of appeals, *Guyton v. State*,<sup>33</sup> expressly rejected the view that different standards exist for appellate review of circumstantial and direct evidence. To substantiate this view, the court in *Guyton* cited *White v. State*,<sup>34</sup> a 1948 case expressing the view that the reasonable hypothesis rule is exclusively for the guidance of the trier of fact. Although the reasonable hypothesis of innocence test still appears infrequently in Indiana circumstantial evidence cases,<sup>35</sup> the most common treatment has been to ignore it and apply either the reasonable inference test or the substantial evidence test.<sup>36</sup>

The reasonable hypothesis of innocence test has also encountered rejection in other jurisdictions. Although this special test for reviewing sufficiency of circumstantial evidence is still applied by many state courts,<sup>37</sup> it has been rejected by most federal courts. In 1954, the Supreme Court of the United States in *Holland v. United States*<sup>38</sup> held that when a jury is properly instructed on the reasonable doubt standard, an instruction on excluding every reasonable hypothesis of innocence is "confusing and incorrect." In dictum, the Court stated the view that circumstantial evidence is intrinsically no different than direct evidence. Both types of evidence may point to a wholly incorrect result and it is for the jury to weigh the chances that the evidence correctly points to guilt against the possibility of an inaccurate or ambiguous inference.<sup>39</sup> Although the *Holland* case involved only a

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<sup>33</sup>299 N.E.2d 233 (Ind. Ct. App. 1973).

<sup>34</sup>226 Ind. 309, 311, 79 N.E.2d 771, 772 (1948).

<sup>35</sup>For the most recent application of the reasonable hypothesis of innocence test, see *Carpenter v. State*, 307 N.E.2d 109 (Ind. Ct. App. 1974).

<sup>36</sup>The substantial evidence test is discussed in Part III *infra*.

<sup>37</sup>UNDERHILL § 17, at 29 n.6. *Accord*, *State v. Fortes*, 293 A.2d 506 (R.I. 1972). *Contra*, *State v. Harvill*, 106 Ariz. 386, 476 P.2d 841 (1970); *People v. Bennett*, 515 P.2d 466 (Colo. 1973).

<sup>38</sup>348 U.S. 121 (1954).

<sup>39</sup>*Id.* at 140. The Court stated that:

Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

question of the proper jury instruction, eight of the eleven United States courts of appeals, many of them relying on the above dictum from *Holland*, have expressly rejected the application of a special standard of review for circumstantial evidence.<sup>40</sup> The fate of the special test in the Fifth and Eighth Circuits may not yet be settled,<sup>41</sup> and only in the Seventh Circuit is there a possibility that the rule is still applicable at the appellate level.<sup>42</sup>

## II. REASONABLE INFERENCE TEST

From 1901 to 1967, the period that the reasonable hypothesis of innocence test was held exclusively for guidance at the trial level, the most frequently cited rule for reviewing sufficiency of circumstantial evidence was what will be referred to as the reasonable inference test.<sup>43</sup> This test requires the re-

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<sup>40</sup>*United States v. Taylor*, 482 F.2d 1376, 1377 (4th Cir. 1973); *United States v. Currier*, 454 F.2d 835, 838 (1st Cir. 1972); *United States v. Fench*, 470 F.2d 1234, 1242 (D.C. Cir. 1972), *cert. denied*, 410 U.S. 909 (1973); *United States v. Hamilton*, 457 F.2d 95, 98 (3d Cir. 1972); *United States v. Henry*, 468 F.2d 892, 894 (10th Cir. 1972); *United States v. Ordonez*, 469 F.2d 70, 71 (9th Cir. 1972); *United States v. Glasser*, 443 F.2d 994, 1006-07 (2d Cir. 1970), *cert. denied*, 404 U.S. 854 (1971); *United States v. Stroble*, 431 F.2d 1273, 1276 (6th Cir. 1970).

Also, the reasonable hypothesis of innocence test is clearly no longer a proper jury instruction in a federal criminal trial. *United States v. Bartlett*, 449 F.2d 700, 705 (8th Cir. 1971), *cert. denied*, 405 U.S. 932 (1972); *United States v. Hansbrough*, 450 F.2d 328 (5th Cir. 1971); *United States v. Martine*, 442 F.2d 1022, 1023 (10th Cir. 1971); *United States v. Siragusa*, 450 F.2d 592, 596 (2d Cir. 1971); *cert. denied*, 405 U.S. 974 (1972); *United States v. Stubin*, 446 F.2d 457 (3d Cir. 1971); *Thompson v. United States*, 405 F.2d 1106, 1108 (D.C. Cir. 1968); *United States v. Whiting*, 311 F.2d 191, 198 (4th Cir. 1962).

<sup>41</sup>*United States v. Irby*, 480 F.2d 1101, 1103 (8th Cir. 1973); *United States v. Sutherland*, 463 F.2d 641, 643 (5th Cir. 1972), *cert. denied*, 409 U.S. 1178 (1973). *But see* *United States v. Jones*, 418 F.2d 818, 826-27 (8th Cir. 1969); *United States v. Johnson*, 469 F.2d 973, 796 (5th Cir. 1972). *See also* Note, *Circumstantial Evidence in the Federal Courts—The Fifth Circuit and the Holland Case*, 14 U. FLA. L. REV. 89 (1961).

<sup>42</sup>*Doyle v. United States*, 318 F.2d 419, 425 (7th Cir. 1963); *United States v. McCarthy*, 196 F.2d 616, 619 (7th Cir. 1952).

<sup>43</sup>*Maydwell v. State*, 248 Ind. 270, 226 N.E.2d 332 (1967); *Breedlove v. State*, 235 Ind. 429, 134 N.E.2d 226 (1956); *Shutt v. State*, 233 Ind. 169, 117 N.E.2d 892 (1954); *Petillo v. State*, 228 Ind. 97, 89 N.E.2d 623 (1950); *Stice v. State*, 228 Ind. 144, 89 N.E.2d 914 (1950); *Kestler v. State*, 227 Ind. 274, 85 N.E.2d 76 (1949); *McAdams v. State*, 226 Ind. 403, 81 N.E.2d 671 (1948); *White v. State*, 226 Ind. 309, 79 N.E.2d 771 (1948); *Mandich v. State*, 224 Ind. 209, 66 N.E.2d 69 (1946); *Scharillo v. State*, 207 Ind. 22, 191 N.E. 76 (1934); *Wood v. State*, 207 Ind. 235, 192 N.E. 257 (1934); *Howard v. State*, 193 Ind. 599, 141 N.E. 341 (1923).

viewing court to examine the circumstantial evidence, not for the purpose of finding whether or not it is adequate to overcome every reasonable hypothesis of innocence, but to determine if an inference of guilt may be reasonably drawn from the evidence to support the finding of the trier of fact.<sup>44</sup> The cases employing this test generally do not set forth the criteria the reviewing court is to use in determining if the inference of guilt is reasonable. For example, in *Kestler v. State*,<sup>45</sup> the Supreme Court of Indiana admitted that there was no evidence to support defendant's conviction of the first degree murder of his wife but cursorily found the circumstantial evidence sufficient to authorize the jury to find the defendant guilty of murder in the second degree. The evidence reviewed by the court disclosed that on the night of the shooting, defendant and his brother had been out to dinner and had been drinking. Upon returning home, the defendant put his arm around his wife and they went into the bedroom while the defendant's brother went downstairs to see his nieces. When he was returning upstairs, he heard his brother say, "Mable watch that gun, its loaded," and then there as a shot. The defendant claimed the shooting was accidental and that the gun went off when his wife was handing him the gun. There was no evidence in the record that defendant and his wife had argued that evening. The brother testified, however, that before the shot he could see his brother through the open bedroom door and that he could not see his brother's wife. Also, the gun had two safety devices and a trigger. Admitting that the evidence raised conflicting inferences of guilt and innocence, the court relied upon the conflicting inferences rule and held that there was evidence from which the jury could have inferred that the defendant purposely and maliciously killed his wife.

In reversing convictions when applying the reasonable inference test, the supreme court has stated that an inference cannot be based upon evidence which is uncertain or speculative.<sup>46</sup> For example, in *Howard v. State*,<sup>47</sup> the defendant and his companions accepted a ride with a stranger from Cincinnati. An officer stopped the car, found whiskey in the back seat, and arrested everyone for possession of liquor with intent to sell. The court, on appeal, reversed defendant's conviction and held that a con-

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<sup>44</sup>*Dowty v. State*, 203 Ind. 228, 235, 179 N.E. 720, 723 (1932).

<sup>45</sup>227 Ind. 274, 85 N.E.2d 76 (dissenting opinions).

<sup>46</sup>*Shutt v. State*, 233 Ind. 169, 174, 117 N.E.2d 892, 894 (1954).

<sup>47</sup>193 Ind. 599, 141 N.E. 341 (1923).

viction based on circumstantial evidence alone cannot rest upon "improbable, imaginary and unnatural inferences."<sup>48</sup>

Even though the reasonable inference rule is often directly contrary to the reasonable hypothesis of innocence test in terms of result, it is frequently applied today, often in combination with the substantial evidence rule. Since the *Manlove* decision in 1968, of the twenty cases applying the reasonable inference test,<sup>49</sup> only three resulted in a reversal on the ground that the evidence proved only a suspicion of guilt.<sup>50</sup> Four of the seventeen affirmed convictions engendered dissents,<sup>51</sup> and only eight of the seventeen affirmed convictions would clearly have been affirmed under the reasonable hypothesis of innocence test.<sup>52</sup> In *Vaughn v.*

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<sup>48</sup>*Id.* at 604, 141 N.E. at 343.

It should be noted that in Indiana inferences based upon other inferences are not necessarily considered speculative or uncertain. The Indiana cases recognize an exception to the rule that one inference cannot be based upon another when the first inference is based on firmly established circumstantial evidence and becomes, in the mind of the trier of fact, a proven fact. *Walker v. State*, 250 Ind. 649, 653, 238 N.E.2d 466, 468-69 (1968); *Brown v. State*, 219 Ind. 21, 23-24, 36 N.E.2d 759, 160 (1941); *Hinshaw v. State*, 147 Ind. 334, 363, 47 N.E. 157, 166 (1897).

<sup>49</sup>*Boys v. State*, 304 N.E.2d 789 (Ind. 1973); *McAfee v. State*, 291 N.E.2d 554 (Ind. 1973); *Gunn v. State*, 281 N.E.2d 484 (Ind. 1972); *Hightower v. State*, 256 Ind. 344, 269 N.E.2d 10 (1971); *Vaughn v. State*, 255 Ind. 678, 266 N.E.2d 219 (1971); *Stuck v. State*, 255 Ind. 350, 264 N.E.2d 611 (1970); *Glover v. State*, 253 Ind. 536, 255 N.E.2d 657 (1970); *Kindred v. State*, 254 Ind. 105, 257 N.E.2d 818 (1970); *Kindred v. State*, 254 Ind. 73, 257 N.E.2d 667 (1970); *Hobbs v. State*, 253 Ind. 195, 252 N.E.2d 498 (1969); *Farno v. State*, 308 N.E.2d 725 (Ind. Ct. App. 1974); *Klebs v. State*, 305 N.E.2d 789 (Ind. Ct. App. 1974); *Cornman v. State*, 294 N.E.2d 812 (Ind. Ct. App. 1973); *Glover v. State*, 300 N.E.2d 902 (Ind. Ct. App. 1973); *Greeley v. State*, 301 N.E.2d 853 (Ind. Ct. App. 1973); *Guyton v. State*, 299 N.E.2d 233 (Ind. Ct. App. 1973); *Haynes v. State*, 293 N.E.2d 204 (Ind. Ct. App. 1973); *Sarten v. State*, 303 N.E.2d 300 (Ind. Ct. App. 1973); *Walker v. State*, 293 N.E.2d 35 (Ind. Ct. App. 1973); *Shank v. State*, 289 N.E.2d 315 (Ind. Ct. App. 1972).

<sup>50</sup>*Glover v. State*, 253 Ind. 536, 255 N.E.2d 657 (1970); *Kindred v. State*, 254 Ind. 105, 257 N.E.2d 667 (1970); *Greeley v. State*, 301 N.E.2d 853 (Ind. Ct. App. 1973).

<sup>51</sup>*McAfee v. State*, 291 N.E.2d 554 (Ind. 1973); *Vaughn v. State*, 255 Ind. 678, 266 N.E.2d 219 (1971); *Kindred v. State*, 254 Ind. 73, 257 N.E.2d 667 (1970); *Hobbs v. State*, 253 Ind. 195, 252 N.E.2d 498 (1969).

<sup>52</sup>*Boys v. State*, 304 N.E.2d 789 (Ind. 1973); *Hightower v. State*, 254 Ind. 344, 269 N.E.2d 10 (1971); *Stuck v. State*, 255 Ind. 350, 264 N.E.2d 611 (1970); *Klebs v. State*, 305 N.E.2d 781 (Ind. Ct. App. 1974); *Cornman v. State*, 294 N.E.2d 812 (Ind. Ct. App. 1973); *Haynes v. State*, 293 N.E.2d

*State*,<sup>53</sup> one of the nine cases in which application of the reasonable hypothesis of innocence test would probably have required reversal, the supreme court upheld a conviction of theft. The only evidence linking defendant to the theft of two saddles was his possession of the saddles two days after the theft. Even disregarding Vaughn's explanation that he bought the saddles from a stranger in a bar, the reasonable hypothesis of innocence test would seem to have required reversal of Vaughn's conviction.

### III. SUBSTANTIAL EVIDENCE TEST

The substantial evidence test, in addition to being applied by the Indiana appellate courts in reviewing the sufficiency of direct evidence,<sup>54</sup> is frequently applied in circumstantial evidence cases. The test appears in many variations, but it generally requires that the reviewing court look only to the evidence most favorable to the State and the reasonable inferences to be drawn therefrom to determine if there is substantial evidence of probative value sufficient to establish every material element of the crime. In conjunction with this test, the court generally states the often repeated rule that the reviewing court will not weigh the evidence nor determine the credibility of the witnesses.<sup>55</sup> As demonstrated by *Schooler v. State*,<sup>56</sup> the appellate courts rarely define what is considered substantial evidence. In *Schooler*, the defendant was convicted of shoplifting several items from a men's clothing store. Several shirts and a man's suit were missing soon after defendant and her companion left the store. A parking lot attendant observed the defendant and her companion come from the men's store and go to their car. They then left and did not come back for several hours. In the meantime, the police observed the car and noticed a brown paper sack in the car containing what looked like a man's suit and some shirts. The police arrested defendant and her companion when they returned to the car. At that time, both defendant and her companion were carrying straw bags which contained nothing except a head scarf.

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204 (Ind. Ct. App. 1973); *Sarten v. State*, 303 N.E.2d 300 (Ind. Ct. App. 1973); *Walker v. State*, 293 N.E.2d 35 (Ind. Ct. App. 1973).

<sup>53</sup>255 Ind. 678, 266 N.E.2d 219 (1971).

<sup>54</sup>*Dickens v. State*, 295 N.E.2d 613, 617 (Ind. 1973); *McFarland v. State*, 295 N.E.2d 809 (Ind. 1973); *Jones v. State*, 293 N.E.2d 545, 550 (Ind. Ct. App. 1973).

<sup>55</sup>*Ledcke v. State*, 296 N.E.2d 412 (Ind. 1973).

<sup>56</sup>247 Ind. 624, 218 N.E.2d 135 (1966) (Jackson, J., dissenting).

The bag in the car was found to contain the merchandise from the men's store. In affirming defendant's conviction, the court stated that "a conviction can rest entirely upon circumstantial evidence if there is substantial evidence of probative value to support an inference of guilt."<sup>57</sup>

Cases discussing the meaning of substantial evidence have described it as more than "seeming and imaginary."<sup>58</sup> In *Easton v. State*,<sup>59</sup> the supreme court explained that the test of substantial evidence was whether the trier of fact could reasonably find the fact at issue beyond a reasonable doubt. With substantial evidence so defined, the reasonable inference test and substantial evidence test are obviously closely related, and they are often cited in combination.<sup>60</sup> The conflicting inference rule is also frequently cited in cases applying the substantial evidence test.<sup>61</sup> This rule, however, is completely incompatible with the reasonable hypothesis of innocence test since it requires the court on appeal

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<sup>57</sup>*Id.* at 627, 218 N.E.2d at 136.

<sup>58</sup>*Powell v. State*, 250 Ind. 663, 665, 237 N.E.2d 95, 96 (1968); *Finch v. State*, 249 Ind. 122, 126, 231 N.E.2d 45, 47 (1967).

<sup>59</sup>248 Ind. 338, 228 N.E.2d 6 (1967). See also *Baker v. State*, 236 Ind. 55, 62, 138 N.E.2d 641, 645, quoting from *State v. Gregory*, 339 Mo. 133, 143 96 S.W.2d 47, 52 (1936), as follows:

Now since the test of substantial evidence is whether a jury reasonably could find the issue thereon, the result must depend in some measure upon the degree of persuasion required. In a criminal case liberty and sometimes life are involved, and there cannot be a conviction except upon a finding of guilt beyond a reasonable doubt. Necessarily, therefore, it becomes the duty of an appellate court as a matter of law to decide whether the evidence was sufficient to induce a belief of the defendant's guilt beyond a reasonable doubt in the minds of jurors of average reason and intelligence. And in resolving that question the court undoubtedly can pass on the credibility of the testimony to the extent of determining whether it was substantial in the sense above explained. In no other way can the rights of the defendant be protected. It would be an incongruous situation if the court were compelled to let a conviction stand as being supported by evidence warranting a verdict of guilt beyond a reasonable doubt, when *for any reason* made manifest on the record the court is convinced the evidence reasonably could not support a conviction.

<sup>60</sup>*Phillips v. State*, 295 N.E.2d 592, 593-94 (Ind. 1973); *Tibbs v. State*, 255 Ind. 309, 311-12, 263 N.E.2d 728, 730 (1970); *Christen v. State*, 228 Ind. 30, 39, 89 N.E.2d 445, 448 (1950); *Klebs v. State*, 305 N.E.2d 781, 784 (Ind. Ct. App. 1974).

<sup>61</sup>*Young v. State*, 257 Ind. 173, 177, 273 N.E.2d 285, 287 (1971); *Tait v. State*, 244 Ind. 35, 44, 188 N.E.2d 537, 542 (1963); *Byrd v. State*, 243 Ind. 452, 458, 185 N.E.2d 422, 425 (1962).

to accept the inference of guilt even though there is an equally compelling inference of innocence.

As in the case of the reasonable inference test, the substantial evidence test is less likely to result in reversal than the reasonable hypothesis of innocence test. Of eleven circumstantial evidence cases using the substantial evidence test since 1968,<sup>62</sup> five resulted in reversals on the ground that the evidence supported only a suspicion of guilt.<sup>63</sup> Of the remaining six affirmed convictions, at least one, *Ledcke v. State*,<sup>64</sup> would probably have resulted in reversal had the reasonable hypothesis of innocence test been applied. In *Ledcke*, the defendant was convicted of possession of marijuana. The only evidence sustaining a finding of constructive possession was Ledcke's presence in an apartment where marijuana was being manufactured. Ledcke was arrested while trying to leave the apartment by the back door during a raid. Ledcke was not a tenant of the apartment nor was marijuana found on his person. As Justice DeBruler pointed out in his dissent, the defendant could have been visiting the apartment for a "multitude of other and completely lawful activities."<sup>65</sup> Application of the reasonable hypothesis of innocence test certainly would have required a reversal since reasonable hypotheses of innocence did abound.

#### IV. APPELLATE REVIEW AND THE REASONABLE DOUBT STANDARD

From the foregoing discussion, it can be seen that a convicted criminal defendant in Indiana appealing his conviction on the grounds of insufficient circumstantial evidence cannot know with certainty which test of review the Indiana appellate courts will apply. With a view towards insuring convictions only upon evi-

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<sup>62</sup>*Baker v. State*, 298 N.E.2d 445 (Ind. 1973); *Ledcke v. State*, 296 N.E.2d 412 (Ind. 1973); *Tom v. State*, 302 N.E.2d 494 (Ind. 1973); *Taylor v. State*, 284 N.E.2d 775 (1972); *Young v. State*, 257 Ind. 173, 273 N.E.2d 285 (1971); *Tibbs v. State*, 255 Ind. 309, 263 N.E.2d 728 (1970); *Vuncannon v. State*, 254 Ind. 206, 258 N.E.2d 639 (1970); *Ellis v. State*, 252 Ind. 472; 250 N.E.2d 364 (1969); *Liston v. State*, 252 Ind. 513, 250 N.E.2d 739 (1969); *Durham v. State*, 250 Ind. 555, 238 N.E.2d 9 (1968); *Pfeifer v. State*, 283 N.E.2d 567 (Ind. Ct. App. 1972).

<sup>63</sup>*Tom v. State*, 302 N.E.2d 494 (Ind. 1973); *Tibbs v. State*, 255 Ind. 309, 263 N.E.2d 728 (1970) (reversing in part); *Vuncannon v. State*, 254 Ind. 206, 258 N.E.2d 639 (1970); *Liston v. State*, 252 Ind. 513, 250 N.E.2d 739 (1969) (reversing in part); *Durham v. State*, 250 Ind. 555, 238 N.E.2d 9 (1968).

<sup>64</sup>296 N.E.2d 412 (Ind. 1973).

<sup>65</sup>*Id.* at 422.

dence sufficient beyond a reasonable doubt, the reasonable hypothesis of innocence test would seem to be the better test to achieve this purpose. Courts and legal writers in rejecting the reasonable hypothesis of innocence test frequently assert that a special standard of review for circumstantial evidence is unnecessary. It is contended that since both direct and circumstantial evidence can lead to an incorrect result, the substantial evidence test is sufficient for reviewing both types of evidence.<sup>66</sup> It is not to be refuted that direct evidence, which is dependant upon truthful testimony, can lead to erroneous convictions. However, direct evidence is entirely dependant upon credibility of the witnesses, and the appellate courts have valid reasons for refusing to review this type of evidence. The reviewing court must accept the trier of fact's apparent assessment of testimonial evidence since it is obviously difficult to ascertain truthfulness without an opportunity to observe the witnesses.<sup>67</sup> To illustrate, if an eyewitness to a crime positively identifies the defendant as the perpetrator and the jury returns a verdict of guilty, the jury obviously believes the witness. The court on review should reverse the conviction only if the record discloses conclusive evidence that the witness was lying—for example, if the defendant was conclusively shown to have been in prison at the time of the alleged crime. However, in a circumstantial evidence case, the testimonial evidence will not directly establish guilt. The jury must accept or reject the offered testimonial evidence *and* draw an inference

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<sup>66</sup>Holland v. United States, 348 U.S. 121, 140 (1954); WIGMORE § 26, at 401; Note, *Sufficiency of Circumstantial Evidence in a Criminal Case*, 55 COLUM. L. REV. 549 (1955); cf. UNDERHILL § 16, at 24; 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 467 (1969).

<sup>67</sup>The Supreme Court of Indiana in Cox v. State, 49 Ind. 568, 571 (1875), described the importance of allowing the trier of fact to judge the credibility of the witnesses as follows:

In considering the weight of testimony by this court, it must be remembered that such evidence comes before us merely in written words; while the court and jury trying the cause have it from the living voice, with whatever peculiar accent, emphasis, or intonation it may have; and that they see the witness, his countenance, looks, expression of face, manner, readiness, or reluctance, and the many nameless indices of truth or falsehood, which it is impossible to put in words. A statement of facts in words, though testified to by different witnesses, of various degrees of credibility, comes to us with the same weight, while to the court and jury their weight would be, in some instances, the full import of the words, and in others scarcely worth consideration. Hence it is that the credibility of a witness is a question solely for the jury, they being the triers of fact; and the presumption in this court must be that they understood their duty, and performed it.

of guilt from the evidence accepted as credible. It is submitted that the reviewing court is equally capable of determining the inference to be drawn from the evidence most favorable to the State and that if such evidence supports a reasonable hypothesis of innocence, the inference of guilt is not reasonable in light of the standard of proof of guilt beyond a reasonable doubt.<sup>68</sup>

A distinction should be made between relitigating the facts on appeal and weighing the sufficiency of the inference of guilt drawn from those facts. The policy behind the rule that courts of review do not weigh the evidence lies in the guarantee of a jury trial under the Indiana Constitution.<sup>69</sup> Regardless of how the appellate courts express the test for reviewing sufficiency of circumstantial evidence, however, it is apparent that some weighing of the evidence must take place. Were the courts of review to refuse to weigh the evidence in criminal appeals based on sufficiency of the evidence, convictions could only be overturned upon a showing of no evidence to support the verdict. This would be a return to the *scintilla* rule<sup>70</sup> and a clear rejection of the appellate courts' role in insuring convictions only upon proof beyond a reasonable doubt.

It is conceded that each of the tests reviewed in this Note depends upon an elusive standard. It would be impossible for the courts to promulgate a comprehensive definition of substantial evidence, reasonable inference, or reasonable hypothesis of innocence. Every criminal fact situation reviewed in a sufficiency of the evidence appeal is different. However, the use of the reasonable hypothesis of innocence test rather than the other two tests results in a shift in the emphasis of the court's review. By using the reasonable hypothesis of innocence test, the reviewing court determines the reasonableness of a conviction in light of *all* the reasonable inferences to be drawn from the evidence most favorable to the State. By using the reasonable inference test or the substantial evidence test, the court's review is limited to only those inferences supporting the verdict. It is submitted that the latter type of review cannot insure a conviction upon proof

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<sup>68</sup>*Manlove v. State*, 250 Ind. 70, 79, 232 N.E.2d 874, 879 (1968).

<sup>69</sup>IND. CONST. art. 1, § 19.

<sup>70</sup>Although the *scintilla* rule has been rejected in Indiana in the case of *Easton v. State*, 248 Ind. 338, 343, 228 N.E.2d 6, 10 (1967), earlier cases allowed reversal of a conviction only upon a showing of no evidence to support the verdict. *Krstovich v. State*, 186 Ind. 556, 557, 117 N.E. 209 (1917); *Lee v. State*, 156 Ind. 541, 546, 60 N.E. 299, 301 (1901); *McCarty v. State*, 127 Ind. 223, 225, 26 N.E. 665, 666 (1891).

beyond a reasonable doubt in a case entirely dependent upon circumstantial evidence.

The seemingly high reversal rate resulting from the use of the reasonable hypothesis of innocence test at the appellate level is not unexpected. Plea bargaining and resultant guilty pleas account for the disposition of many criminal charges based on substantial evidence.<sup>71</sup> Criminal cases that go to trial are of basically three types: cases in which the defendant is innocent, cases in which the defendant is guilty but the evidence is so weak that he elects not to plea bargain, and cases in which the evidence against the defendant is so strong that the State refuses to plea bargain. On appeal, convictions based on weak evidence, regardless of the defendant's guilt or innocence, would be reversed if the appellate court applied the reasonable hypothesis of innocence test. Such convictions might not be reversed if the court applied the reasonable inference test or the substantial evidence test. Convictions based on substantial evidence would be affirmed regardless of the test applied. Until society determines that it would be better served by convicting innocent men to insure that all criminals are punished, the reasonable hypothesis of innocence test is the best test for insuring convictions upon proof beyond a reasonable doubt.

## V. CONCLUSION

The appellate court's first consideration in reviewing a sufficiency of the evidence question should be to determine whether the record discloses any evidence to support the conviction. When no evidence is disclosed on review, none of the tests discussed above need be applied, and the reviewing court must reverse as a matter of law. In such a case, to affirm would be a denial of due process.<sup>72</sup> A finding of no evidence may arise when there is a complete absence of a vital fact, when the court is barred by rules of law or of evidence from giving weight to the only evidence

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<sup>71</sup>Indiana county prosecutors estimated the number of felonies plea-bargained in their counties during 1973 in a prosecutors' survey compiled by the Criminal Justice Planning Agency. There are ninety-two counties in Indiana and eight-one county prosecutors representing eighty-five counties reported. One reporting county, Sullivan, gave no estimate and three counties reported the exact number of felonies plea-bargained: Clinton County—99%, Hamilton County—53.5%, and Putnam County—88%. Of the remaining seventy-seven prosecutor estimates, the average number of cases plea bargained was 63%, the median was 65%, and the mode was 50%.

<sup>72</sup>*Garner v. Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960).

offered to prove a vital fact, and when the evidence establishes conclusively the opposite of the vital fact.<sup>73</sup>

When sufficiency of curcumstantial evidence is at issue, the court should accept the testimonial evidence most favorable to the State, but it should not limit its consideration to only those inferences therefrom supporting the conclusion of the trier of fact. In reviewing all of the reasonable inferences to be drawn from the evidence most favorable to the State, if the evidence discloses a reasonable hypothesis of innocence, the conviction should be reversed. The conflicting inferences rule should be limited to apply only to conflicting direct evidence. If the circumstantial evidence supports a reasonable inference of innocence as well as guilt, the conviction should be reversed as unsupported by proof beyond a reasonable doubt.

LINDA A. HAMMEL

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<sup>73</sup>Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 TEXAS L. REV. 361, 362 (1960).

## PRESIDENTIAL POWER TO MAKE WAR

Prior to the Korean conflict, United States military forces had never been involved in combat for an extended period of time absent an express congressional declaration of war.<sup>1</sup> Because of this, article I, section 8, clause 11 of the Constitution<sup>2</sup> has rarely received judicial interpretation.<sup>3</sup> However, beginning with the Korean conflict and later the situation in Indochina, the courts were faced with an ever increasing demand to decide whether, in light of this provision, the President as Commander-in-Chief has the constitutional authority to make war for an extended period of time<sup>4</sup> or whether a congressional declaration of war is necessary.<sup>5</sup>

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<sup>1</sup>Limited Naval War with France was authorized in Act of July 9, 1798, ch. 68, § 1, 1 Stat. 578; Limited Naval War with Tripoli—Act of February 6, 1802, ch. 4, 2 Stat. 129; War of 1812—Act of June 18, 1812, ch. 102, 2 Stat. 755; Limited Naval War with Algiers—Act of March 3, 1815, ch. 90, § 2, 3 Stat. 230; Mexican War—Act of May 13, 1846, ch. 16, 9 Stat. 9; Civil War—Act of August 6, 1861, ch. 63, § 3, 12 Stat. 326; Spanish-American War—Act of April 25, 1898, ch. 189, 30 Stat. 364; 1914 Mexican Conflict—Act of April 22, 1914, Res. 10, 38 Stat. 770; World War One—Act of April 6, 1917, ch. 1, 40 Stat. 1; World War Two—Act of December 8, 1941, ch. 561, 55 Stat. 795 (Japan); Act of December 11, 1941, ch. 564, 55 Stat. 796 (Germany); Act of December 11, 1941, ch. 565, 55 Stat. 797 (Italy).

<sup>2</sup>"Congress shall have the Power . . . (t)o declare War, grant Letters of Marque and Reprisal . . . ."

<sup>3</sup>*E.g.*, The Prize Cases, 67 U.S. (2 Black) 635 (1862), wherein the Court stated that the President can, in an emergency, commit acts of war. Thus, Lincoln, was acting within his power in blockading southern ports in April 1861. However, Congress shortly after the President's action, declared war, and the Court took this ratification into consideration. See *Ludecke v. Watkins*, 335 U.S. 160 (1948), wherein the Court, in a case involving emergency war powers, refused to declare that World War Two had terminated.

<sup>4</sup>Judge Wyzanski in *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973), expressed the view that:

[T]here are some types of war, which, without Congressional approval, the President may begin to wage: for example, he may respond immediately without such approval to a belligerent attack, or in a grave emergency he may, without Congressional approval, take the initiative to wage war. Otherwise the country would be paralyzed.

Wyzanski thereupon went on to declare that the Vietnam war was not such a war.

See also Berger, *War Making by the President* 121 U. PA. L. REV. 29 (1972), wherein it is asserted that it was intended that the President could only *repel* attacks unless otherwise authorized; Lofgren, *War-Making*

To date, the Supreme Court has yet to deal with the merits of these questions due to plaintiffs' failures to successfully overcome numerous procedural obstacles.<sup>6</sup> With the exception of a summary affirmance of a Pennsylvania district court's refusal to consider the merits,<sup>7</sup> the Supreme Court has refused to hear cases challenging the constitutionality of the undeclared war. The refusals have, at various times, been opposed in dissenting opinions by Justices Douglas,<sup>8</sup> Stewart,<sup>9</sup> Harlan,<sup>10</sup> Marshall,<sup>11</sup> and Brennan,<sup>12</sup>

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*Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972), wherein the author in his study of the Constitutional Convention concluded that the power to commence, as well as to declare, war was intended by the Founding Fathers to be vested in Congress. For a defense of Presidential action, see Rehnquist, *The Constitutional Issues-Administration Position*, 45 N.Y.U.L. REV. 628 (1970), wherein Justice Rehnquist, then Assistant U.S. Attorney General, argued that the President, as Commander-in-Chief, could initiate the combat. It is, however, noteworthy that the actions Rehnquist cited as precedent were without exception short term emergency acts.

<sup>5</sup>The President's authority to take military action in an emergency was not questioned by the plaintiffs in the Indochina cases. They asserted however, that Vietnam was not an emergency and that there was sufficient time for the President to obtain Congressional authorization. For example, the Second Circuit in *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970), requested the Constitutional Lawyer's Committee on Undeclared War to provide standards to illustrate those situations in which a presidential war was permissible and those in which it was not. The Committee declined, pointing out that whatever standards were used, the Vietnam war was clearly one which must be declared by Congress. A. D'AMATO & R. O'NEIL, *VIETNAM AND THE COURTS* 69 (1972).

<sup>6</sup>In *Luftig v. McNamara*, 373 F.2d 664, 665 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967), the court, in an opinion in which the then Circuit Judge Burger took part, concluded its curt refusal to hear the merits of the case by stating:

The only purpose to be accomplished by saying this much on the subject is to make clear to others comparably situated and similarly inclined that resort to the courts is futile, in addition to being wasteful of judicial time, for which there are other urgent legitimate demands.

<sup>7</sup>*Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd*, 411 U.S. 911 (1973) (Brennan, Douglas, & Stewart, JJ., dissenting.)

<sup>8</sup>*Sarnoff v. Shultz*, 409 U.S. 929 (1973); *DaCosta v. Laird*, 405 U.S. 979 (1971); *Massachusetts v. Laird*, 400 U.S. 886 (1970); *Hart v. United States*, 391 U.S. 956 (1968); *Holmes v. United States*, 391 U.S. 936 (1968); *Mora v. McNamara*, 389 U.S. 934 (1967); *Mitchell v. United States*, 386 U.S. 972 (1967).

<sup>9</sup>*Atlee v. Laird*, 411 U.S. 911 (1973); *Massachusetts v. Laird*, 400 U.S. 886 (1970); *Mora v. McNamara*, 389 U.S. 934 (1967).

<sup>10</sup>*Massachusetts v. Laird*, 400 U.S. 886 (1970).

as an unjustified exercise of judicial restraint. Perhaps the most important effect of the Court's failure to resolve the issue<sup>13</sup> is the varied and inconsistent treatment to which the cases raising the issue have been subjected in the lower courts. These differing dispositions, as well as the numerous procedural obstacles facing plaintiffs, constitute the focal point of this Note.

### I. SOVEREIGN IMMUNITY

Sovereign immunity has not proved to be a significant obstacle to constitutional challenges to the war. The traditional rule that sovereign immunity does not bar a suit if it is alleged that government officials acted "beyond their statutory authority" or, though statutorily authorized, the powers themselves or the way in which they have been exercised is in violation of the Constitution, has generally been followed in the anti-war cases.<sup>14</sup> The plaintiffs in these cases have alleged violations found within the second exception as the use of funds to pursue the war was alleged to be in conflict with article I, section 8, clause 11 of the Constitution.<sup>15</sup> There have been, however, at least two instances in which the courts have imposed sovereign immunity as a bar to constitutional challenges to the Indochina war.<sup>16</sup>

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<sup>11</sup>Holtzman v. Schlesinger, 414 U.S. 1304 (1973). Even though Justice Marshall upheld the stay of an injunction against the war, 361 F. Supp. 553 (E.D.N.Y. 1973), he indicated that had the merits been before the Court, he might have held for the plaintiffs. 414 U.S. at 1313.

<sup>12</sup>Atlee v. Laird, 411 U.S. 911 (1973); Orlando v. Laird, 404 U.S. 869 (1971).

<sup>13</sup>This refusal by the Court to hear the issue led Douglas to frustratedly complain in 1971:

While we debate whether to decide the constitutionality of this war, our countrymen are daily compelled to undergo the physical and psychological tortures of armed combat on foreign soil . . . . The issues are large; they are precisely framed; we should decide them.

DaCosta v. Laird, 405 U.S. 979, 980-81, (1971).

<sup>14</sup>See, e.g., Philadelphia Co. v. Stimson, 223 U.S. 605 (1912); *Ex parte Young*, 209 U.S. 123 (1908).

<sup>15</sup>Berk v. Laird, 429 F.2d 302 (2d Cir. 1970); Atlee v. Laird, 339 F. Supp. 1347 (E.D. Pa.) *dismissed on other grounds*, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd*, 411 U.S. 911 (1973); Mottolla v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970), *rev'd on other grounds*, 464 F.2d 178 (9th Cir. 1972); Davi v. Laird, 318 F. Supp. 478 (W.D. Va. 1970).

<sup>16</sup>Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967); *accord*, Gravel v. Laird, 347 F. Supp. 7 (D.D.C. 1972).

## II. STANDING

Shortly after the Supreme Court held that a taxpayer had sufficient standing to challenge federal aid to parochial schools in *Flast v. Cohen*,<sup>17</sup> Lawrence Velvel, then a constitutional law professor at the University of Kansas, brought suit alleging that the inflation caused by the war, the diminishing funds available for welfare, and the death and injury of Americans, including one of Velvel's relatives, constituted a sufficient personal stake in the outcome to satisfy the standing requirements set forth in *Flast*.<sup>18</sup> The Tenth Circuit, however, held that these factors did not establish a personal stake sufficiently distinguishable from that of the rest of the population.<sup>19</sup> The court feared that if these connections with the constitutional issue justified standing, then nearly every citizen could bring a similar action and the doctrine of standing would have lost all meaning.<sup>20</sup> In describing specifically Velvel's failure to satisfy the *Flast* tests, the court held that the power to appropriate the funds for the conduct of the war in Indochina arose from the power to raise and support armies<sup>21</sup> and not under the taxing and spending clause of article I, section 8, and that, even if they had arisen under the taxing and spending clause, the complaint was not based upon a congressional breach of a "specific limitation upon its taxing and spending power."<sup>22</sup> Justice Clark, sitting by designation in the Second Circuit, reached the same result in *Pietsch v. President of the United States*,<sup>23</sup> and

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<sup>17</sup>392 U.S. 83 (1968). See also *Data Processing Serv. v. Camp*, 397 U.S. 150 (1970), in which the Court held that "injury in fact" need not be economic.

<sup>18</sup>In *Flast*, the Court held two criteria must be met for a taxpayer to have standing:

First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, Sec. 8, of the Constitution . . . . Secondly, . . . the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, Sec. 8. 392 U.S. at 102.

<sup>19</sup>*Velvel v. Nixon*, 415 F.2d 236, (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970).

<sup>20</sup>*Id.* at 238.

<sup>21</sup>Art. 1, § 8, cls. 12-13.

<sup>22</sup>415 F.2d at 239.

<sup>23</sup>434 F.2d 861 (2d Cir.), *cert. denied*, 403 U.S. 920 (1970).

pointed out that since Congress' power to declare war has never been viewed as a "specific limitation" upon the appropriations power, Pietsch's suit could not be heard on the merits.

A. *Standing of Draftees and Servicemen*

It would seem that servicemen, who must either fight the wars or live under the very real threat of fighting them, would have little problem with standing. However, this has not always been the case. The issue of standing of draftees to challenge the constitutionality of the war and use the alleged unconstitutionality as a defense against criminal prosecution for draft resistance first arose during the Korean conflict. The Second Circuit in *United States v. Bolton*<sup>24</sup> held the draft resisters' challenge to be "premature" and stated that questions as to the legality of orders to fight in an undeclared war in Korea could only be brought by those who have received such orders and not by Bolton, "who might never be ordered abroad for military duty, even if he reported for induction."<sup>25</sup>

The Second Circuit in the trial of David Mitchell for draft evasion in 1966 agreed.<sup>26</sup> Mitchell, a well known anti-war figure, raised, in addition to the alleged unconstitutionality of the war, the possibility of being subjected as a result of the Nuremburg Trials to conviction for war crimes.<sup>27</sup> Following *Bolton*, the court raised the distinction between the induction of soldiers into the armed forces and the task to which they are assigned and noted that not all those drafted would serve in Vietnam.<sup>28</sup> Although the

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<sup>24</sup>192 F.2d 805 (2d. Cir. 1951).

<sup>25</sup>*Id.* at 806.

<sup>26</sup>*United States v. Mitchell*, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967).

<sup>27</sup>Treaty of London, August 8, 1945, 59 Stat. 1544.

<sup>28</sup>*Mitchell* also illustrates another obstacle with which those challenging the constitutionality of the war had to contend, particularly in the early years of the Indochina conflict. Connecticut Chief District Court Judge Timbers expressed his feelings towards *Mitchell* in no uncertain terms:

Leaving aside the sickening spectacle of a 22 year old citizen of the United States seizing the sanctuary of a nation dedicated to freedom of speech to assert such tommyrot and leaving aside also the transparency of his motives for doing so, the decisive point is that such political or philosophical views, even if sincerely entertained, are utterly irrelevant as a defense to the charge of willful refusal to report for induction in the armed forces of the United States . . . .

246 F. Supp. 874, 899 (D. Conn.), *aff'd*, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967).

Supreme Court denied certiorari, Justice Douglas, calling it a "delicate and sensitive question," became the first on the Court to vote to grant review.<sup>29</sup>

The courts, with a few major exceptions, have generally followed *Bolton* and *Mitchell* in allowing only those assigned to combat duty to challenge the constitutionality of the war.<sup>30</sup> Judge Wyzanski in *United States v. Sisson*<sup>31</sup> noted his disagreement with a defense in a criminal prosecution for draft resistance the unconstitutionality of the Indochina war. In so finding, Wyzanski stated that draft calls, "if not directly determined by military demands in Vietnam, are so closely correlated as to be unmistakably inter-dependent."<sup>32</sup> Sisson's victory turned out to be academic, since the court refused, nonetheless, to hear the merits of the case, by terming it a political question.<sup>33</sup> Sisson, however, was more fortunate than Mitchell. The court eventually acquitted him after finding him to be a conscientious objector, even though his objections were not based on religion.<sup>34</sup>

Judge Sweigert, in a California district court case, *Mottola v. Nixon*,<sup>35</sup> applied a test of "vulnerability," and that three law student members of the reserves had standing. A fourth law student, who was a draft registrant, was denied standing on the ground that his claim was premature. The Ninth Circuit, adopting the *Bolton* rationale, and reversing Sweigert's granting of standing stated that "only those under military orders to report to a theatre of hostilities have the requisite standing"<sup>36</sup> to make such a challenge.

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<sup>29</sup>386 U.S. 972 (1967) (Douglas, J., dissenting).

<sup>30</sup>*United States v. Battaglia*, 410 F.2d 279 (7th Cir. 1969); *United States v. Simmons*, 406 F.2d 456 (5th Cir.), *cert. denied*, 395 U.S. 982 (1969), ("[A]ppellant assumes that induction into the armed forces and participation in the Vietnam war are synonymous, and this is clearly not the case." *Id.* at 460); *Ashton v. United States*, 404 F.2d 95 (8th Cir. 1968), *cert. denied*, 394 U.S. 960 (1969).

<sup>31</sup>294 F. Supp. 511 (D. Mass. 1968).

<sup>32</sup>*Id.* at 512.

<sup>33</sup>See notes 54-83 *infra* & accompanying text.

<sup>34</sup>297 F. Supp. 902 (D. Mass. 1969), *appeal dismissed*, 399 U.S. 267 (1970).

<sup>35</sup>318 F. Supp. 538 (N.D. Cal. 1970).

<sup>36</sup>464 F.2d 178, 179 (9th Cir. 1972), *rev'g* 318 F. Supp. 538 (N.D. Cal. 1970).

Even when a soldier has been assigned to an area of combat, standing may still be denied. In *Holtzman v. Schlesinger*,<sup>37</sup> the Second Circuit held that because the servicemen were transferred from the combat zone after the commencement of the suit, the plaintiffs no longer had standing.<sup>38</sup> The court went on to state that standing was not preserved because there was no "cognizable danger or recurrent violation" as there was in *United States v. W. T. Grant Co.*<sup>39</sup> In *Holtzman*, the court held that there was little chance of a recurrence, because the August 15, 1973, cut-off date for American activity in Cambodia<sup>40</sup> was only a week away.<sup>41</sup>

On the other hand, there has been one instance of a judge's applying a very broad standing test to reach what he termed an important question. Chief Judge Lord of the Eastern District of Pennsylvania, in ruling solely on the court's jurisdiction, allowed suit to be brought in *Atlee v. Laird*.<sup>42</sup> Plaintiff's standing based solely on citizenship was held to be sufficient. Judge Lord ruled that the personal stake need not be "unique to the individual, but may be shared by millions of others with a similar status, as the federal taxpayer in *Flast*."<sup>43</sup> Lord stated that, "[t]he blood of these men provide a sufficient 'conservational interest' on the part of every citizen in saving human resources of this nation."<sup>44</sup> Lord justified his action by explaining that he had not rendered standing a nullity, as was the fear in *Velvel*, but rather eased restriction on it in areas of "paramount national importance."<sup>45</sup> Lord's decision, however, stands alone, and the three-judge court, without

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<sup>37</sup>484 F.2d 1307 (2d Cir. 1973).

<sup>38</sup>The air force planned to commence court martial proceedings against one of the plaintiffs, Captain Dawson, stemming from his refusal to fly bombing missions but dropped charges in January, 1974.

<sup>39</sup>345 U.S. 629, 633 (1953).

<sup>40</sup>Act of July 1, 1973, Pub. L. No. 93-52, § 108, 87 Stat. 130; Act of July 1, 1973, Pub. L. No. 93-50, § 307, 87 Stat. 99.

<sup>41</sup>484 F.2d at 1315.

<sup>42</sup>339 F. Supp. 1347 (E.D. Pa.), *dismissed on other grounds*, 347 F. Supp. 689 (3d Cir. 1972), *aff'd*, 411 U.S. 911 (1973).

<sup>43</sup>*Id.* at 1355.

<sup>44</sup>339 F. Supp. at 1356. Lord cited *Scenic Hudson Preservation Conference v. Hardin*, 354 F.2d 608 (2d Cir. 1965); and *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Ala. 1971). *But see* *Sierra Club v. Morton*, 405 U.S. 727 (1972), wherein it was held that petitioner must show personal injury to have standing.

<sup>45</sup>339 F. Supp. at 1356.

commenting on standing, nevertheless refused to hear the case on the ground that it presented a nonjusticiable political question.<sup>46</sup> No other court has been so liberal in interpreting standing in anti-war cases, and even a judge as sympathetic as Sweigert stated that he would not have extended standing so far.<sup>47</sup>

### B. Legislator's Standing

In *Coleman v. Miller*,<sup>48</sup> the Supreme Court held that a state legislator in Kansas had standing to sue if deprived of his right to vote on the ratification of federal constitutional amendments. It would, therefore, seem that a Congressman would be allowed to be heard by the court in challenging the executive's usurpation of power at the expense of Congress. The District of Columbia Circuit, in *Mitchell v. Laird*,<sup>49</sup> a case brought by Representative Paden Mitchell and thirteen other members of the House, did so hold. *Mitchell* seemingly overruled an earlier case brought by Senator Mike Gravel in the District of Columbia District Court,<sup>50</sup> in which it was held that Gravel and the twenty-one other Congressmen who joined with him had no standing in that they had suffered no injury, either as Congressmen or individuals.

However, *Mitchell* did not pave the way for suits by Congressmen, since less than five months later the Second Circuit held that Congress woman Elizabeth Holtzman lacked standing to challenge the war.<sup>51</sup> The court reasoned that the President had not deprived her of her vote, and that her voice was ineffective "due to the contrary votes of her colleagues,"<sup>52</sup> who compromised for an August 15th cut-off of funds for Cambodia rather than an immediate one.<sup>53</sup> The Second Circuit in so ruling appears to have mis-

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<sup>46</sup>347 F. Supp. 689 (E.D. Pa. 1972), *aff'd*, 411 U.S. 911 (1973).

<sup>47</sup>*Campen v. Nixon*, 56 F.R.D. 404 (N.D. Cal. 1972) (holding status as a citizen and taxpayer insufficient for standing).

<sup>48</sup>307 U.S. 433 (1939).

<sup>49</sup>488 F.2d 611 (D.C. Cir. 1973).

<sup>50</sup>*Gravel v. Laird*, 347 F. Supp. 7 (D.D.C. 1972).

<sup>51</sup>*Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir.), *rev'g*, *Holtzman v. Richardson*, 361 F. Supp. 544 (E.D.N.Y. 1973). Suit brought by Congressman Drinan of Massachusetts, *Drinan v. Nixon*, 364 F. Supp. 854 (D. Mass. 1973), was decided on other grounds and did not deal with the issue of standing.

<sup>52</sup>484 F.2d at 1315.

<sup>53</sup>Act of July 1, 1973, Pub. L. No. 93-52, § 108, 87 Stat. 130; Act of July 1, 1973, Pub. L. No. 93-50, § 307, 87 Stat. 99.

construed the nature of Congresswoman Holtzman's claim. She alleged that article I, section 8, clause 11 requires affirmative action to be taken for extended military combat to take place and that Congress' failure to take affirmative action to end hostilities could not satisfy the declaration required.

### III. POLITICAL QUESTION

Even in cases in which standing has been adequately demonstrated, a litigant usually still faced impediments precluding a decision on the merits. The courts have generally held that the question of whether or not the conduct of the war met constitutional requirements was a nonjusticiable political question. Although the political question doctrine was recognized by the Supreme Court as early as *Marbury v. Madison*,<sup>54</sup> the most explicit definition of the doctrine was announced by Justice Brennan in *Baker v. Carr*:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for an unquestioning adherence to a political decision already made or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>55</sup>

The political question doctrine has been further delineated by the Supreme Court, in *Powell v. McCormack*.<sup>56</sup> *Powell* held that article I, section 5, upon which the House of Representatives based its exclusion of Adam Clayton Powell was "at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution."<sup>57</sup> Therefore, the Court found itself competent to rule on whether the House had complied with the Constitution; the Court held that the need for respect of

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<sup>54</sup>5 U.S. (1 Cranch) 137 (1803).

<sup>55</sup>369 U.S. 186, 217 (1962).

<sup>56</sup>395 U.S. 486 (1969).

<sup>57</sup>*Id.* at 548.

coordinate branches did not justify the judicial branch's "avoiding [its] constitutional responsibility."<sup>58</sup>

In *Baker*, it was specifically noted that not all cases involving foreign affairs are "beyond cognizance."<sup>59</sup> However, the courts are much more restrictive in cases involving foreign affairs than they are in domestic affairs. In 1947, the Supreme Court held, in *Chicago & Southern Air Lines v. Waterman Steamship Corp.*,<sup>60</sup> that a complaint based upon a denial of foreign air routes by the Civil Aeronautics Board was a political question. The Court initially noted that they could not take action since much of the relevant information was kept secret and in addition:

[E]ven if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative . . . . These are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibilities. . . .<sup>61</sup>

Nevertheless, there is equally impressive precedent for judicial intervention in the *Prize Cases*<sup>62</sup> and *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>63</sup> In *Youngstown*, the Supreme Court held that President Truman could not as Commander-in-Chief seize the nation's steel mills, even though he claimed that steel was necessary for the nation's efforts in the Korean conflict. The Court ruled that this power was assigned to Congress by the Constitution and that Congress had previously rejected such a seizure. The political question doctrine did not prevent the Court from deciding this crucial issue since it involved an interpretation of a delegation of power.

The district and circuit courts, handicapped by the lack of Supreme Court guidance on the constitutionality of the war, have utilized varying approaches to challenges to the war. Assuming the plaintiff has the requisite standing, some courts have still declined to hear any of the issues. In 1967, the District of Columbia

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<sup>58</sup>*Id.* at 549.

<sup>59</sup>369 U.S. at 211.

<sup>60</sup>333 U.S. 103 (1948).

<sup>61</sup>333 U.S. at 111; *accord*, *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304 (1936).

<sup>62</sup>See note 3 *supra*.

<sup>63</sup>343 U.S. 579 (1952).

Circuit, in *Luftig v. McNamara*,<sup>64</sup> refused to even decide whether a declaration of war was necessary for the executive to send troops overseas and expressed the view that foreign policy is "plainly and exclusively" a matter for Congress and the President. In 1970, a Virginia district court in *Davi v. Laird*,<sup>65</sup> while conceding that generally the commitment of troops is to be shared by the Executive and Congress "under various sets of circumstances," held the question of whether Vietnam required such joint action to be a nonjusticiable political question. This reasoning by that court seems futile since if the courts will not decide what those circumstances are, they become meaningless.

The Eastern District of Pennsylvania ruled similarly in *Atlee v. Laird*,<sup>66</sup> the only anti-war case the Supreme Court has heard and affirmed, albeit summarily. The district court ruled that deciding the case on the merits would require a finding of whether there was a war, whether Congress had authorized it, and whether the President would, nonetheless, have the authority to take action without congressional authorization.<sup>67</sup> Despite Justice Stewart's dissent in the denial of certiorari in *Mora v. McNamara*,<sup>68</sup> wherein he listed similar questions, the court in *Atlee* held them to present nonjusticiable political questions. The court in *Atlee*, however, appears to have missed the point of the suit in deciding that it could not answer these questions because of the confidentiality, bulk, and difficulty of assembling the data. Although the court's reasoning would have been adequate in a suit challenging the morality of the war, it was not applicable to a claim challenging

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<sup>64</sup>373 F.2d 664 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967).

<sup>65</sup>318 F. Supp. 478 (W.D. Va. 1970).

<sup>66</sup>347 F. Supp. 689 (E.D. Pa. 1972), *aff'd*, 411 U.S. 911 (1973).

<sup>67</sup>347 F. Supp. at 703.

<sup>68</sup>Stewart listed the following "questions of great magnitude:"

I. Is the present United States military activity in Vietnam a 'war' within the meaning of Article I, Section 8, Clause 11, of the Constitution?

II. If so, may the Executive constitutionally order the petitioners to participate in that military activity, when no war has been declared by the Congress?

III. Of what relevance to Question II are the present treaty obligations of the United States?

IV. Of what relevance to Question II is the Joint Congressional ("Tonkin Gulf") Resolution of August 10, 1964?

389 U.S. at 934.

the legality of the war. An examination of congressional acts was accessible for determining whether Congress had authorized the President's action. The primary reason that data and standards were not available for answering what constituted a war and whether the President could have taken action without congressional authorization was the court's previous avoidance of the issue.<sup>69</sup> The court in *Atlee* did offer the suggestion that if Congress would pass a resolution calling for the cessation of hostilities, the courts would hear the issue. This would, however, change the constitutional requirements as the plaintiffs claimed that under article I, section 8, Congress must declare war in order for there to be extended hostilities, and that if Congress did not act, there could be no war. As in *Holtzman*, the court could have decided the constitutional question, but chose not to do so.

In order to force the courts to hear the issue, the Massachusetts legislature passed a bill calling for the state's attorney general to bring suit in the name of the Commonwealth and any citizen who was under orders to serve in combat in an undeclared war.<sup>70</sup> The purpose of the act was to seek an interpretation by the Supreme Court of article I, section 8, clause 11. As a result, a com-

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<sup>69</sup>Judge Sweigert in *Campen v. Nixon*, 56 F.R.D. 404, 407 (N.D. Cal. 1972), recommended a Supreme Court decision:

If the state of the law remains as it now stands the American people will never be able to determine with any degree of certainty from equivocal Congressional actions and votes whether the Vietnam War, or any future presidentially conducted war, is being conducted with the kind of Congressional declaration and approval required by the Constitution; they will never be able to determine with any degree of certainty whether Congress is meeting or shirking its Constitutional responsibility and, if shirking its responsibility, then which members thereof are to blame for permitting a President to usurp the war-making power.

<sup>70</sup>MASS. ACTS ch. 174, § 1, (1970) reads:

No inhabitant of the commonwealth inducted or serving in the military forces of the United States shall be required to serve outside the territorial limits of the United States in the conduct of armed hostilities not an emergency and not otherwise authorized in the powers granted to the President of the United States in Article 2, Section 2, of the Constitution of the United States designating the President as the Commander-in-Chief, unless such hostilities were initially authorized or subsequently ratified by a congressional declaration of war according to the constitutionally established procedures in Article I, Section 8 of the Constitution of the United States.

Section 2 describes the procedure by which the state attorney general shall bring suit.

plaint was filed by the State in 1970. In *Massachusetts v. Laird*,<sup>71</sup> the Supreme Court, without opinion, denied leave to file a complaint with Justices Douglas, Stewart, and Harlan dissenting. Douglas attacked the unstated reasons for the Supreme Court's denial.<sup>72</sup> The Court, in the 1922 case of *Massachusetts v. Mellon*,<sup>73</sup> had held that it was the federal government, not the state governments, which represents the citizen as *parens patriae* with respect to their relations with the federal government. Douglas unsuccessfully argued that this doctrine had been eroded and pointed to *Massachusetts v. Mellon*'s companion case, *Frothingham v. Mellon*,<sup>74</sup> being limited by *Flast*.<sup>75</sup> More significantly, Douglas asserted that the case did not present a nonjusticiable political question and described how the claim met the six point test of *Baker*. First, citing *Powell v. McCormack*,<sup>76</sup> he claimed that this suit's function was to determine the scope of the commitment, a determination which the courts were allowed to make. Secondly, he contended that there were manageable standards—the issue being whether the Tonkin Gulf Resolution<sup>77</sup> or other acts of Congress were acts of war. Thirdly, he claimed that this was not a policy decision since the issue was not whether the war in Vietnam was wise, but rather whether congressional authorization was necessary and present. Fourthly, citing *Powell* once again and *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>78</sup> he stated that it is “more important to be respectful to the Constitution than to a coordinate branch of government.”<sup>79</sup> Fifthly, he claimed that the issue had not been committed to either the executive or legislative branch. Finally, in response to the threat of “multifarious pronouncements,” he asserted that “government cannot take life, liberty, or property of the individual and escape adjudication by the courts of the legality of its action.”<sup>80</sup>

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<sup>71</sup>400 U.S. 886 (1970).

<sup>72</sup>*Id.*

<sup>73</sup>262 U.S. 447, 485-86 (1922).

<sup>74</sup>262 U.S. 447 (1922).

<sup>75</sup>See note 18 *supra*.

<sup>76</sup>395 U.S. 486 (1969).

<sup>77</sup>Act of August 10, 1964, Pub. L. No. 88-408, 78 Stat. 384.

<sup>78</sup>343 U.S. 579 (1952).

<sup>79</sup>400 U.S. at 894.

<sup>80</sup>*Id.* at 896.

Douglas' arguments were to no avail, as Judge Wyzanski, upon hearing the case in district court, nonetheless dismissed the claim since it contained a political question.<sup>81</sup> The First Circuit, in affirming, found that although the commonwealth could not bring suit as *parens patriae*, the individual servicemen did have standing.<sup>82</sup> However, the court also held that the question presented was committed to the other branches of government and held that this was the most important of the *Baker* tests. In addition, the First Circuit indicated that even if it had decided the case on its merits, it would have held for the defendants due to the congressional support for the war. The court indicated, however, that if either the Executive or Congress had clearly opposed the combat, "a court might well take a different view."<sup>83</sup>

#### IV. THE MERITS—CONGRESSIONAL AUTHORIZATION

##### A. *Berk and Orlando*

In 1970, in two important decisions, the Second Circuit expanded the First Circuit's approach and held questions as to the war's legality to be justiciable. In remanding *Berk v. Laird*,<sup>84</sup> Judge Anderson stated that:

History makes clear that the congressional power 'to declare War' conferred by Article I, section 8, of the Constitution was intended as an explicit restriction upon the power of the Executive to initiate war on his own prerogative which was enjoyed by the British sovereign. Although Article II specifies that the President 'shall be Commander in Chief of the Army and Navy of the United States' and also vests the 'executive power' in him and requires that he 'take Care that the Laws be faithfully executed,' these provisions must be reconciled with the congressional war power.<sup>85</sup>

Therefore, it was held that there must be "some mutual participation" if there had been "prolonged foreign military activities." Holding that adjudication of the issue did not contain unmanageable standards, the court went to the merits.

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<sup>81</sup>327 F. Supp. 378 (D. Mass. 1971).

<sup>82</sup>451 F.2d 26 (1st Cir. 1971).

<sup>83</sup>*Id.* at 34.

<sup>84</sup>429 F.2d 302 (2d Cir. 1970).

<sup>85</sup>*Id.* at 305.

District Court Judge Judd, on remand, found the "mutual participation" to be the Tonkin Gulf Resolution<sup>86</sup> and congressional approval of military appropriations. The Resolution, passed in response to alleged attacks on United States naval vessels in Vietnam, "supported the determination of the President . . . to take all necessary measures to repel an armed attack against the forces of the United States and prevent further aggression." In section two, the resolution stated that the "United States is, therefore prepared to take all necessary steps, including the use of armed force . . . ." It has been argued that Congress intended merely to authorize the President to defend against direct attacks similar to the action in Tonkin Bay. This argument hinges on the language "repel an armed attack" in section one. In addition, it was asserted that section two merely states that Congress was prepared, upon request of the President, to go so far as to declare war, and that the resolution does not constitute a declaration of war in and of itself.<sup>87</sup> Judge Judd, however, held otherwise and found that the Tonkin Gulf Resolution authorized the President's action. He also stated that passage of military appropriations was indicative of Congress' support. Although it was argued that congressional debate clearly showed that many of those who voted for appropriations did so solely to protect troops already in Vietnam, and that many who voted for the appropriations actually opposed the war,<sup>88</sup> Judd rejected this argument. He asserted that the mere fact that some Congressmen "talked like doves before voting with the hawks [was] an inadequate basis for a charge that the President was violating the Constitution in doing what Congress by its words told him he must

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<sup>86</sup>Act of August 10, 1964, Pub. L. No. 88-408, 78 Stat. 384.

<sup>87</sup>Velvel, *The War in Vietnam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 KAN. L. REV. 449, 478 (1968).

<sup>88</sup>*E.g.*, Senator Javits of New York stated at 111 CONG. REC. 9454 (1965):

I do not regard a vote for the appropriation—which I propose to support—as being of the same quality as a command decision to send U.S. combat troops to participate in the ground struggle against the Vietcong.

Senator McGovern of South Dakota expressed similar views at 112 CONG. REC. 4409 (1966):

I want to make it clear that my vote for this military equipment bill is not an endorsement of our Asia policy. Rather, my vote reflects my conviction that we must protect men we have sent into battle no matter how mistaken the policy may be that sent them to that battlefield.

do.”<sup>89</sup> In *Orlando v. Laird*,<sup>90</sup> with which *Berk* was consolidated on appeal, the Second Circuit affirmed the district court’s holding. By the time the Second Circuit handed down its decision, Congress had already repealed the Tonkin Gulf Resolution<sup>91</sup>—nonetheless, the court noted that the Resolution was in effect when the action arose and thus was sufficient to serve as congressional authorization. The Second Circuit also agreed that since Congress knowingly passed appropriations bills and draft extensions, Congress had authorized the war.

Although *Berk* and *Orlando* held that the necessity of authorization was a justiciable question with manageable standards, the court ruled that the propriety of the means adopted by Congress to ratify the presidential action was a political question. This was held to be within the discretion of Congress so as to provide the flexibility necessary to conduct foreign affairs. In spite of the court’s finding of “mutual participation,” *Berk* and *Orlando* can be considered as victories for those choosing to challenge the constitutionality of an undeclared war. The court indicated that at least the courts of the Second Circuit were willing to hear these cases on their merits, even if the Supreme Court was not.

Following the repeal of the Tonkin Bay Resolution,<sup>92</sup> Ernest DaCosta, a draftee ordered to Vietnam, brought the first<sup>93</sup> of his three suits against the war. The Second Circuit, once again ruling on the merits, in affirming the district court’s decision, rejected DaCosta’s contention that by repealing the Resolution, Congress withdrew its authorization of combat. The circuit court stated that in *Orlando* the Resolution was not the sole authorization of the war. The court held that the extension of the Selective Service Act<sup>94</sup> and additional military appropriations subsequent

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<sup>89</sup>317 F. Supp. 715, 724 (E.D.N.Y. 1970).

<sup>90</sup>443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971) (Brennan & Douglas, JJ., dissenting). *Orlando* and *Berk* were consolidated on appeal.

<sup>91</sup>Act of January 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053. The decision was handed down March 20, 1971, more than two months after the repeal took effect.

<sup>92</sup>Act of January 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053.

<sup>93</sup>*Decosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971), *cert. denied*, 405 U.S. 979 (1972) (“DaCosta II”); *DaCosta v. Laird*, 55 F.R.D. 145 (E.D.N.Y.), *aff’d*, 456 F.2d 1335 (2d Cir. 1972) (“DaCosta II”); *DaCosta v. Laird*, 471 F.2d 1146 (2d Cir. 1973) (“DaCosta III”).

<sup>94</sup>It is baffling that the Second Circuit, to establish mutual participation, claimed that Congress authorized the war by re-enacting draft legislation

to the repeal of the Tonkin Gulf Resolution furnished evidence of congressional authorization. Thus, the court concluded that Congress, in repealing the Resolution, did not intend to bring United States military activity in Vietnam to an "abrupt halt."<sup>95</sup>

Not all courts were content with the argument that Congress authorized military involvement through appropriations. Judge Sweigert of the Northern District of California, after ruling that the plaintiffs lacked standing as citizens and taxpayers, nonetheless indicated in dicta in *Campen v. Nixon*<sup>96</sup> that congressional authorization was nonexistent. Sweigert, who earlier had displayed his willingness to entertain challenges to the war in *Motola v. Nixon*,<sup>97</sup> stated that Congressmen were "faced with a Presidential fait accompli" and voted for draft and military appropriations only to protect those who were already in Vietnam.<sup>98</sup>

In March 1973, Judge Wyzanski, who previously had held in *United States v. Sisson*<sup>99</sup> and *Massachusetts v. Laird*,<sup>100</sup> that the war presented a nonjusticiable political question, revealed a change of philosophy in *Mitchell v. Laird*.<sup>101</sup> Sitting by designation on the District of Columbia District Court, he also voiced his disagreement with that court's prior case law in *Luftig v. McNamara*<sup>102</sup> and *Mora v. McNamara*,<sup>103</sup> and held, in accord with

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and reasoned that many of the call-ups were due to our Indochina involvement. Yet, with the exception of *United States v. Sisson*, 294 F. Supp. 511 (D. Mass. 1968), the judiciary did not allow inductees standing, in spite of the claim that they would likely be sent to Vietnam.

<sup>95</sup>448 F.2d at 1370. The court also pointed out that the House defeated the McGovern-Hatfield Amendment, 117 CONG. REC. 5410 (1971), which would have cut off military funds for Indochina. The court claimed Congress voted knowing that such action could serve as approval for the war.

<sup>96</sup>56 F.R.D. 404 (N.D. Cal. 1972).

<sup>97</sup>318 F. Supp. 538 (N.D. Cal. 1970), *rev'd*, 464 F.2d 178 (9th Cir. 1972).

<sup>98</sup>See note 88 *supra*.

<sup>99</sup>294 F. Supp. 511 (D. Mass. 1968).

<sup>100</sup>See notes 70-83 *supra* & accompanying text.

<sup>101</sup>488 F.2d 611 (D.C. Cir. 1973).

<sup>102</sup>373 F.2d 664 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967). Wyzanski stated, "Despite *Luftig v. McNamara*, . . . which admittedly indicates that it is beyond judicial competence to determine the allocation, between the executive and legislative branches, of the powers to wage war, we are now persuaded that there may be, in some cases, such competence." 488 F.2d at 614.

<sup>103</sup>387 F.2d 862 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967).

*Orlando*, that the court was competent to rule on the constitutionality of the war. He also agreed with *Orlando* that the methodology of ratification should be left to the discretion of Congress. However, he departed from *Orlando* on the question of what form that ratification could assume. Congress, Wyzanski held, had not authorized our Indochina involvement since military appropriations could not be construed as congressional approval, but rather should be construed as an attempt merely to provide necessary protection for those troops already in Indochina.<sup>104</sup> However, Wyzanski refused to enjoin the continuation of United States military involvement since the war was commenced before Nixon assumed the presidency. As a result, he held the President only had to make a good faith effort to end the war, and whether he was so acting presented a political question that could not be answered in the absence of "clear abuse."<sup>105</sup> Nevertheless, Wyzanski did adopt a different approach, one that probably would have resulted in the war's being held unconstitutional if challenged during the Kennedy or Johnson administrations.

### *B. The Mansfield Amendment*

In the early 1970's, signs of congressional opposition to the war gradually began to emerge. In 1971, after repealing the Tonkin Gulf Resolution, Congress passed the Mansfield Amendment to the Military Procurement Authorization Act<sup>106</sup> which declared it to be United States "policy" to "terminate at the earliest practicable date" American military involvement in Indochina. To implement this policy, Congress urged the President to take three steps—first, set a date for withdrawal of American military forces contingent upon the release of all American pris-

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This court cannot be unmindful of what every schoolboy knows: that in voting to appropriate money or to draft men a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft act refers to that war. A Congressman wholly opposed to the war's commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting. An honorable, decent, compassionate act of aiding those already in peril is no proof of consent to the actions that placed and continued them in that dangerous posture.

488 F.2d at 615.

<sup>105</sup>*Id.* at 616.

<sup>106</sup>Act of November 17, 1971, Pub. L. No. 92-156, § 601, 85 Stat. 423.

oners of war and an accounting of all Americans missing in action, second, begin negotiations with the North Vietnamese for a ceasefire, and third, make an agreement with the North Vietnamese for the withdrawal of military personnel in exchange for the release of American prisoners of war. Upon signing the act into law, President Nixon expressed the opinion that the Mansfield Amendment was not binding upon him, and that he would consequently not obey it.<sup>107</sup> In addition to the Mansfield Amendment, the Military Procurement Act also included the Fulbright Proviso to avoid authorization by implication. In making funds available for the military, it provides that it should not be "construed as authorizing the use of any such funds to support Vietnamese or other free world forces."<sup>108</sup>

The Mansfield Amendment received its first test in *DaCosta II*.<sup>109</sup> The Eastern District of New York, affirmed by the Second Circuit without opinion, held the Mansfield Amendment to be "binding," in spite of what it termed the President's "very unfortunate statement."<sup>110</sup> However, the court held that the measure gave wide discretion to the President, and that the ordering of DaCosta to return to Vietnam was not necessarily inconsistent with it. In his appeal brief to the Second Circuit, DaCosta argued that:

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<sup>107</sup>Nixon stated:

To avoid any possible misconceptions, I wish to emphasize that . . . the so-called "Mansfield Amendment" does not represent the policies of this administration. . . . [I]t is without binding force or effect, and it does not reflect my judgment about the way in which the war should be brought to a conclusion. My signing of the bill that contains this section, therefore, will not change the policies I have pursued and that I shall continue to pursue toward this end.

R. NIXON, *On Signing the Military Procurement Act of 1971*, in 7 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1531 (1971).

<sup>108</sup>Act of November 17, 1971, Pub. L. No. 92-156, § 501(a), 85 Stat. 423. This is commonly known as the "Fulbright Proviso." It first appeared in Act of October 2, 1970, Pub. L. No. 91-441, § 502 (a), 84 Stat. 905, and has appeared in every military appropriations act henceforth. Act of January 11, 1971, Pub. L. No. 91-668, § 838(a), 84 Stat. 2020; Act of November 17, 1971, Pub. L. No. 92-156, § 501(a), 85 Stat. 423; Act of December 18, 1971, Pub. L. No. 92-204, § 738(a), 85 Stat. 716; Act of September 26, 1972, Pub. L. No. 92-436, § 601, 86 Stat. 734; Act of October 26, 1972, Pub. L. No. 92-570, § 738(a), 86 Stat. 1184.

<sup>109</sup>*DaCosta v. Laird*, 55 F.R.D. 145 (E.D.N.Y.), *aff'd*, 456 F.2d 1335 (2d Cir. 1972).

<sup>110</sup>*Id.* at 146.

It is a cruel irony that the Mansfield Amendments—the *only explicit* Congressional declaration of policy concerning the war in Vietnam—have been construed out of existence by the very court which permitted Congressional assent to the war to be liberally inferred in the first place. Thus, Congress is in the position of having authorized a war inferentially and having its explicit attempt to end it ignored by both the President and the Courts.<sup>111</sup>

With the commencement of the mining of North Vietnamese ports and harbors on May 8, 1972, DaCosta brought his third suit against the war.<sup>112</sup> In *DaCosta III*, it was claimed that the mining was clearly a widening of the war in contravention of the Mansfield Amendment. The Second Circuit, however, reverted to the political question rationale and held that the lack of manageable standards prevented the court from judging whether the President was in conflict with the Mansfield Amendment. Judges, the court ruled, are not competent to ascertain whether a specific military action widens the scope of a war or contributes to its cessation. That question, according to the Second Circuit, is for history.<sup>113</sup>

*C. After the Troops and Prisoners Return—  
The Cambodia Bombing*

In *DaCosta III*, the court indicated that it might have decided the issue otherwise had DaCosta established a “radical change in the character of the war operations.”<sup>114</sup> Such “radical change” was alleged by Congresswoman Holtzman, as a result of the American bombing of Cambodia despite the withdrawal of American troops and the return of the last prisoner of war. In a widely publicized decision on July 25, 1973, Judge Judd of the Eastern District of New York agreed with the plaintiffs and

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<sup>111</sup>Brief for Appellant at 35, *DaCosta v. Laird*, 55 F.R.D. 145 (E.D.N.Y.), *aff'd*, 456 F.2d 1335 (2d Cir. 1972).

<sup>112</sup>*DaCosta v. Laird*, 471 F.2d 1146 (2d Cir. 1973).

<sup>113</sup>A further argument of the plaintiff was based on dicta in *DaCosta I*, 448 F.2d at 1370: “If the Executive were now escalating the prolonged struggle instead of decreasing it, additional supporting action by the Legislative Branch over what is presently afforded, might well be required.” In *DaCosta III*, the court stated that this was limited by the implication that manageable standards must be present.

<sup>114</sup>471 F.2d at 1155.

granted declaratory relief and enjoined the bombing.<sup>115</sup> Judd stated that even if Congress had authorized prior activities in Indochina, a congressional purpose or authorization had not been shown for bombing Cambodia in aid of persons missing in action, "after all known prisoners of war have been released."<sup>116</sup> Judd, applying the principles of agency, also held that the Mansfield Amendment<sup>117</sup> granted the President the authority to make war until the return of American prisoners of war.

Another basis for the decision was the increasing congressional opposition to American involvement in Indochina. On June 25, 1973, Congress passed the "Eagleton Amendment,"<sup>118</sup> which would have immediately cut off funds for the Cambodian bombing. After the President's June 27th veto,<sup>119</sup> Congress passed a resolution signed by the President on July 1, which cut off funds after August 15th.<sup>120</sup> Judd held that even though the cut-off was not to become effective until August 15th, Congress was not authorizing the bombing prior to that date. Judd asserted that Congress settled for that date to avoid a confrontation and that the failure of Congress to specifically cut off funds for the forty-five days preceding that date did "not constitute an implied grant of power."<sup>121</sup> Judd noted a contrary interpretation would improperly shift the onus:

It cannot be the rule that the President needs a vote of only one-third plus one of either House in order to conduct a war, but this would be the consequence of holding that Congress must override a Presidential veto in order to terminate hostilities which it has not authorized.<sup>122</sup>

After an unorthodox series of Supreme Court decisions resulting in an affirmation of the Second Circuit's staying of the

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<sup>115</sup>*Holtzman v. Schlesinger*, 361 F. Supp. 553 (E.D.N.Y.), *rev'd*, 484 F.2d 1307 (2d Cir. 1973).

<sup>116</sup>*Id.* at 563.

<sup>117</sup>Act of November 17, 1971, Pub. L. No. 92-156, § 601, 85 Stat. 423.

<sup>118</sup>119 CONG. REC. 5372-74 (daily ed. June 26, 1973).

<sup>119</sup>119 CONG. REC. 5486 (daily ed. June 27, 1973).

<sup>120</sup>Act of July 1, 1973, Pub. L. No. 93-52, § 108, 87 Stat. 130; Act of July 1, 1973, Pub. L. No. 93-50, § 307, 87 Stat. 99.

<sup>121</sup>361 F. Supp. at 564.

<sup>122</sup>*Id.* at 565.

injunction,<sup>123</sup> the court of appeals reversed Judd's decision on August 8th—one week before the cut-off would take effect.<sup>124</sup> The Second Circuit, in so reversing, held that if the court were not competent to judge in *DaCosta III* whether the bombing and mining of North Vietnam's harbors was a basic change, they likewise could not judge the Cambodian bombing. The court further criticized Judd's findings by stating that the bombing might not be in opposition to the Mansfield Amendment, since it additionally asked the President to strive for a ceasefire. The court, therefore, ruled that it was incapable of deciding whether the bombing furthered or hindered those goals. In addition, the court noted that even if this were not the case, Congress had impliedly authorized the bombing up until August 15th.<sup>125</sup>

This view was further expounded in *Drinan v. Nixon*,<sup>126</sup> brought by a Congressman from Massachusetts and decided by the district court the same day *Holtzman* was reversed. Applying the "conflict" test of *Massachusetts v. Laird*,<sup>127</sup> the court found that while there was a clear conflict between Congress and the President immediately after the President's veto of the Eagleton Amendment, that conflict had been resolved by the August 15th

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<sup>123</sup>In *Holtzman v. Schlesinger*, 414 U.S. 1304 (1973), Justice Marshall refused to vacate the Second Circuit's stay of Judd's injunction. However, he was very careful to state that this had no bearing on his view of the merits. *Id.* at 1313. However, Justice Douglas did so vacate, comparing the importance of the decision to a capital case.

The present case involves whether Mr. X . . . should die. No one knows who they are. They may be Cambodian farmers whose only "sin" is a desire for socialized medicine to alleviate the suffering of their families and neighbors. Mr. X may be the American pilot or navigator who drops a ton of bombs on a Cambodian village. The upshot is that we know someone is about to die.

*Id.* at 1317. Finally, the Court re-instated the stay by a vote of eight to one, as a result of a telephone poll by Justice Marshall. *Schlesinger v. Holtzman*, 414 U.S. 1321 (1973).

<sup>124</sup>484 F.2d 1307 (2d Cir. 1973).

<sup>125</sup>*Id.* at 1316. Justice Oakes dissented and expressed the view that the case did provide manageable standards. He stated that Congress authorized the bombing while laboring under a misconception—Congress did not know that American bombers were secretly attacking Cambodia. He noted that once before a war was questioned in such a manner—by then Congressman Abraham Lincoln during the Mexican War. CONG. GLOBE, 30th Cong., 1st. Sess. Appendix 93 (1848).

<sup>126</sup>364 F. Supp. 854 (D. Mass. 1973).

<sup>127</sup>See notes 70-83 *supra* & accompanying text.

compromise. Thus, there was no longer any need for judicial intervention. This view, however, is in direct opposition to Justice Marshall's belief that Congress, by compromising on the August 15th cut-off, was not thereby authorizing military activity until that date.<sup>128</sup> It is ironic that the court in *Drinan* indicated that if Congress had taken no action after the President's veto, the judicial branch might then have found a conflict and could have declared the President's action unauthorized.

*D. The Future—The War Powers Act*

Congress, to avoid further confusion and to provide the "manageable standards" so often found to be missing, on November 7, 1973, passed the War Powers Resolution, overriding the President's veto.<sup>129</sup> This act makes it necessary for the President to submit a report of any hostilities or substantial enlargement of American military forces in a foreign nation to the leaders of both Houses of Congress within forty-eight hours of the military action. To allow the President to act in emergency situations, the President is allowed to commit combat troops without congressional authorization, but such combat must end within sixty days, with one thirty-day extension if the President certifies to Congress in writing that the extension is necessary for the safety of American military forces. Even within that sixty-day period, Congress may end the combat by a simple majority, not subject to the President's veto, if both Houses so direct. The bill's passage is credited to a "handful of liberal Democrats,"<sup>130</sup> including Holtzman and Drinan, who, though they were originally opposed to the bill because they feared it gave the President more power than he then had, switched their votes.<sup>131</sup> Other liberals, such as Representative Dellums of California and Senator Eagleton, refused to go along. Eagleton argued that the President's authority to make war without congressional authorization was limited to

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<sup>128</sup>Holtzman v. Schlesinger, 414 U.S. 1304, 1312 n.13 (1973):

But while the issue is not wholly free from doubt, it seems relatively plain from the face of the statute that Congress directed its attention solely to military actions after August 15, while expressing no view on the propriety of on-going operations prior to that date.

<sup>129</sup>Act of November 7, 1973, Pub. L. No. 93-148, 55 Stat. 555.

<sup>130</sup>N.Y. Times, Nov. 8, 1973, at 20, col. 1.

<sup>131</sup>Holtzman voted for the bill after being satisfied that it did not add to the President's war powers. 119 CONG. REC. 9660 (daily ed. Nov. 7, 1973). Drinan voted for the resolution since it would "prevent any defacto declaration of a war by the finding of a war." 119 CONG. REC. 9647 (daily ed. Nov. 7, 1973).

retaliatory action in response to a direct attack on the country, an attack on legally deployed American troops, or in order to rescue American citizens abroad. He stated that the bill thus increased the President's power and gave him what amounted to unlimited authority for ninety days.<sup>132</sup> President Nixon who initially vetoed the measure attacked it from the other perspective—that it unconstitutionally deprived him of his powers.<sup>133</sup> This Resolution frames the issue so as to make possible a judicial decision upon presidential noncompliance. The Resolution also would not leave a suit brought by a Congressman open to attack on the ground that standing was lacking. By Congress' taking a position, the rigid standing requirements of *Holtzman* are met. In addition, the Resolution, by enumerating specific standards and creating potential conflict between Congress and the President, should eliminate the obstacle of the political question doctrine.

## V. CONCLUSIONS

Throughout the Indochina war, courts, following the lead of the Supreme Court gingerly approached the issue of whether the war was constitutional. Those courts which did not dismiss the cases due to lack of standing of the plaintiff approached the merits with differing theories and tests. Some courts ruled the entire question to be a political question and therefore not justiciable. Others, such as the First Circuit, held that a court could involve itself only if there were a conflict between the legislative and executive branches. The Second Circuit took a similar position and held that Congress had authorized the war through appropriations. The court would not enjoin the President from conducting a war he had inherited. Still other judges, such as Sweigert in dicta, and Judd, whose ruling in *Holtzman* was promptly reversed, have declared the President's acts unconstitutional. There is a great need for a Supreme Court decision, both

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<sup>132</sup>Eagleton went on to say: "My God, we just got out of a nightmare that lasted nine years in Southeast Asia in what at the outset was going to be a sort of mop-up action." 119 CONG. REC. 20,095 (daily ed. Nov. 7, 1973).

<sup>133</sup>Nixon argued that:

[O]ne of the provisions would automatically cut off certain authorities after sixty days unless the Congress extended them. Another would allow the Congress to eliminate certain authorities merely by the passage of a concurrent resolution—an action which does not normally have the force of law, since it denies the President his constitutional role in approving legislation.

I believe both these provisions are unconstitutional.

*Id.* at 20,093.

because of the importance of the issue and the divergence of the lower court rulings. The new War Powers Resolution which frames the issue so as to make a constitutional conflict inevitable, in combination with an apparently greater willingness on the part of courts to hear the issue, will probably result in the Supreme Court's resolution of the issue.

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